Before the

Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Cross-Ownership of Broadcast Stations and Newspaper	)	MM Docket No. 01-235
	)	
Newspaper/Radio Cross-Ownership Waiver Policy	)	MM Docket No. 96-197

COMMENTS OF CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA, CIVIL RIGHTS FORUM, CENTER FOR DIGITAL DEMOCRACY, LEADERSHIP CONFERENCE ON CIVIL RIGHTS AND MEDIA ACCESS PROJECT

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EXECUTIVE SUMMARY

The groups joining in these comments represent a wide array of consumer, civil rights, and public interest organizations of various types including direct membership grass roots organizations whose purpose is to promote the public interest in media policy.[1] Our initial comments and the accompanying appendices by Pulitzer Prize winning journalist Benjamin Bagdikian, legal scholar C. Edwin Baker, and Wharton economist Joel Waldfogel demonstrate that the legal and marketplace basis for the Newspaper/Broadcast Cross Ownership Rule is stronger than ever.

The Commission's *Notice of Proposed Rulemaking* provides neither a sound understanding of the critical role these ownership limits play in our democracy, nor does it offer adequate data or analysis of media market structure to justify changes to this rule. We ground our analysis in:

- the U.S. Constitution's imperative to promote diverse ownership of media as a cornerstone of the checks and balances necessary to preserve a vibrant democracy and
- substantial empirical evidence of current market conditions combined with detailed analysis of economic incentives showing where traditional market forces fall short.

The fundamental question raised in this proceeding is whether the central goal of the First Amendment as articulated by the Supreme Court in it's 1945 decision in *Associated Press*—information dissemination from diverse and antagonistic sources—can be preserved if

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[1] Consumers Union (CU), publisher of Consumer Reports, is an independent, nonprofit testing and information organization serving only consumers. CU is online at www.consumersunion.org.. The Consumer Federation of America (CFA) is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members. CFA is online at www.consumerfed.org. The Center for Digital Democracy (CDD) is committed to preserving the openness and diversity of the Internet in the broadband era, and to realizing the full potential of digital communications through the development and encouragement of noncommercial, public interest programming. CDD is online at www.democraticmedia.org. The Civil Rights Forum on Communications Policy (CRF), a project of the Tides Center, pursues the twin goals of introducing civil rights principles and advocacy to the implementation of the 1996 Telecommunications Act, and to reframe the discussion over the role of media in our society around the needs of communities and the rights of citizens through education, research, and by forging working links between the civil rights community and others. CRF is online at www.civilrightsforum.org. The Leadership Conference on Civil Rights (LCCR) was founded in 1950, and consists of more than 185 national organizations, representing 50 million Americans that represent persons of color, women, children, labor unions, individuals with disabilities, older Americans, major religious groups, gays and lesbians and civil liberties and human rights groups. LCCR is online at www.civilrights.org. Media Access Project (MAP) is a 28 year-old non-profit, public interest telecommunications law firm which represents civil rights, civil liberties, consumer, religious and other citizens groups before the FCC, other federal agencies and the Courts. MAP is online at www.mediaaccess.org.

newspapers and broadcasting stations in the same community are commonly owned. A diverse information environment is an essential prerequisite of American self-governance. It fuels political participation and animates debate about policy, social norms, cultural values, individual aspirations and community needs in our society.

In Part I, we recognize that the goal articulated in the Supreme Court in 1945 is an open-ended ever-reaching ideal. If some absolute standard of information availability and human intellectual capacity had been adopted by the Supreme Court in 1945, then by 1970 the goal would have certainly been achieved. It would have been all too easy for public policy to declare victory in the struggle to deepen and defend civic discourse and our democracy would be much poorer as a result. Failing to strengthen civic discourse in the face of the information age–which increases rather than decreases the importance of the media to our citizens–will sell Americans short. It will dramatically reduce the capacity for the enlightened debate that the Supreme Court has determined is essential to American democracy.

We also remind the Commission, in Part I, of its heavy burden in this proceeding. The Newspaper/Broadcast Cross Ownership Rule has been upheld by the Supreme Court and explicitly endorsed by Congress for many years. This imperative and governing administrative law require that the Commission affirmatively justify any change to this rule. It may not alter it on the basis of an inconclusive record.

Part II shows that the media's characteristics call into question reliance on certain market principles. Although the market serves many goals well, because of both democratic principles and characteristics of media as a product, an unfettered media market is not likely to promote the public interest of the citizenry. We show, based on the attached analysis of Professors Baker and Waldfogel, that media as a product is not likely to be produced effectively in the marketplace and will not serve all audiences efficiently and fairly.

The production and dissemination of newspaper and broadcast media content involve enormous fixed costs, also called high first-copy costs. To cover these costs, media producers have a strong incentive to produce content for the largest number of consumers, presenting material that serves, and does not offend general, majority tastes. On the other hand, media products are also "non-substitutable"– for viewers, the NBC sit-com *Friends* is not interchangeable with the WB's African-American centered *Moesha*. *CBS Nightly News* is not interchangeable with *Entertainment Tonight*, or even with programming on the Fox News Channel.

Moreover, the media marketplace will not necessarily produce the content people want to watch. Advertiser preferences often trump viewers' preferences because the media relies so heavily on advertising revenue. Advertisers, who want people to be in a receptive mood to learn about their products, do not necessarily mirror viewers' desires. Finally, media is a public good and possesses significant "positive externalities." Like clean air and national defense, benefits accrue to society at large that cannot be captured by the market. For example, investigative journalism uncovering government waste or consumer fraud benefits all–even those who do not read the newspaper or advertise on its pages.

Taken together, economists and experts find that these economic characteristics of media markets lead natural market forces to discriminate against the preferences of minorities – racial, ethnic, and any other relatively small groups whose tastes in media differ from the majority's. Eliminating a newspaper or broadcast voice deprives all citizens of an independent voice and will likely diminish the welfare of the "non-majority"; their economic and political need for news, information, and other vital content will be under-served even in a well-functioning market.

These economic attributes, when combined with media concentration, endanger democracy. The enormous power that goes with ownership allows media owners to promote their own interests or biases through the media in a manner harmful to democratic discourse. Examples of this power are myriad—from GE dictating that its subsidiary, NBC, not cover GE's pollution of the Hudson River with toxic chemicals[1] to the television networks' failure to cover Congress's decision to grant broadcasters free additional spectrum for digital television.[2] If the Commission declaws the watchdog by eliminating the Newspaper/Broadcast Cross Ownership rule, we will lose one of the most crucial pieces of our democracy.

The second half of Part II explains the important and different expertise that newspapers and broadcasting each bring to the public. This "institutional diversity" inheres in the financial structure, culture and professional ethics of each medium. Their differing expertise affects their ability to serve as checks and balances on each other's business interests and reporting bias. As Benjamin Bagdikian points out, while separately owned newspapers and broadcasters generally criticize each other's content, the two media under common ownership "far from offering mutual criticism … become promotional media publicizing the other subsidiary."

Part III focuses on traditional economic factors to refute the contention that a wide range of media are in the same economic market. We show that people rely on newspapers and broadcast television for different kinds of information, depth of analysis, spend vastly different amounts of time with each, consume them in different environments, and pay for them in different ways. In economic terms these are separate markets with weak substitution effects. This is not to say that these markets are not adjacent and there is no rivalry, but that, for example, newspapers' classified advertising mainstay in no way resembles the high-priced pharmaceutical and auto advertising splashed across national prime time television. In this section we also show that the data in the Commission's Notice overlook significant facts about these markets and their players. For example, the Commission incorrectly concludes that the number of local television newsrooms increased since 1975, when its own data show that newsrooms decreased by 10 percent.

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[1] Richard Pollack , "Is GE Mightier Than the Hudson?" *The Nation* (May 28, 2001).

[2] Dean Alger, *Megamedia: How Giant Corporations Dominate Mass Media, Distort Competition, and Endanger Democracy* (Rowman & Littlefield, 1998). In fact, NBC censored a satirical piece on this topic from its television program Saturday Night Live between its first airing and later broadcasts. *See* http:/www.freespeech.org/ramfiles/fair.ram (visited on Dec. 3, 2001).

Finally, in Part IV we cover the rampant consolidation and market power in each media market. Local newspapers have become print monopolies in about 95 percent of communities, with very few or our nation's largest cities supporting multiple papers. Market concentration in cable television ownership is at an all-time high. We show that each market is highly concentrated and adjacent to one another.

The number of owners of the media on which most Americans rely for information, television stations and daily newspapers, has fallen dramatically since the Commission first adopted its rule. One-third of television owners and two-thirds of newspaper owners have disappeared since 1975. There are half as many owners of these media today as there were when the rule was adopted.

While the Internet has changed many things in our society, it has not altered the fundamentals of civic discourse. Compared to the traditional mass media, the Internet accounts for a miniscule share (less than 5 percent) of individual news gathering time or industry advertising revenue.[3] Furthermore, Internet usage is dominated by four providers, which accounted for fifty percent of user minutes online.[4] And last year, one-third of all user minutes spent on the Internet were within the confines of a single company's site—AOL.[5]

Under even conservative antitrust theory, mergers across these markets are dangerous to competition. We review the well-established literature demonstrating that harms associated with vertical and conglomerate mergers. These create barriers to entry, enhance the effectiveness of anti-competitive conduct, and market players will shift from competition to cooperation. While many product markets exhibit some imperfections, the implications of market failure in media are much more profound. These failures will not produce insufficient manufacture of widgets. They will underproduce information that is essential for citizens to become educated, meaningful participants in the democratic process.

If local television broadcasters were allowed to merge with local newspapers, combining the two most important means by which consumers obtain news and information, the combined owner's editorial bias and economic incentives to under-serve the needs of minorities will skew public discourse and thereby harm our nation's democracy. Unless new technologies develop to change the fundamental cost structure of media information production and dissemination, and until print and television programming markers become significantly less concentrated and their products more competitive, the Newspaper/Broadcast Ownership rule will be necessary to protect the economic and civic interests of consumers.

If the combination of newspaper and broadcast properties in a community leads newspapers to reduce their in-depth, investigative reporting in order to serve the more

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[3] *See generally*, UCLA Center for Communication Policy, "Surveying the Digital Future: Year Two" (November 2001).
[4] Jupiter Media Metrix Inc., "Online Media Consolidation Offers No Argument for Media Deregulation" (June 4, 2001)
[5] *Id.*

homogenized, superficial, mass-market advertiser-driven needs of broadcast television, then Justice Brandeis' fear that we not become a society of couch potatoes, "an inert people," will be realized, undermining "a fundamental principle of American government."[6]

To meet its obligations under the U.S. Constitution and Congressional directives, the Commission must maintain the cross-ownership ban. This rule is essential to protect the diversity of independently owned institutional structures that disseminate news and information. This will provide "the widest possible dissemination of information from diverse and antagonistic sources"—the U.S. Supreme Court's articulation of what "… is essential to the welfare of the public," interpreting the First Amendment of the Constitution to mean that "a free press is a condition of a free society."[7]

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[6] *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).
[7] *Associated Press v. U.S.*, 326 U.S. 1 (1945).

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COMMENTS OF CONSUMERS UNION *et al*.

INTRODUCTION

A. INTEREST AND EXPERTISE OF COMMENTERS

The groups joining in these comments represent a wide array of consumer, civil rights, and public interest organizations of various types, including direct membership grass roots organizations, who share the goal of promoting the public interest in media policy.

Consumers Union,[8] Consumer Federation of America,[9] Media Access Project,[10] Center for Digital Democracy,[11] Leadership Conference on Civil Rights,[12] and the Civil Rights Forum[13]

[8] Consumers Union, publisher of Consumer Reports, is an independent, nonprofit testing and information organization serving only consumers. CU is comprehensive source for unbiased advice about products and services, personal finance, health and nutrition, and other consumer concerns. Since 1936, CU's mission has been to test products, inform the public, and protect consumers. CU's income is derived solely from the sale of Consumer Reports and its other services, and from noncommercial contributions, grants, and fees. CU is online at www.consumersunion.org.

[9] The Consumer Federation of America is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members. CFA is online at www.consumerfed.org.

[10] Media Access Project (MAP) is a 28 year-old non-profit, public interest telecommunications law firm which represents civil rights, civil liberties, consumer, religious and other citizens groups before the FCC, other federal agencies and the Courts. MAP is committed to protecting the public's First Amendment rights to receive information, to speak and to be heard in the electronic mass media. MAP is online at www.mediaaccess.org.

(hereinafter CU, *et al.*) respectfully submit these joint comments, with accompanying appendices by Pulitzer-Prize winning journalist Benjamin Bagdikian, Wharton economist Joel Waldfogel, and legal scholar C. Edwin Baker, in response to the Commission's Notice of Proposed Rulemaking.

B. THE CHALLENGE BEFORE THE COMMISSION

This proceeding[14] is framed as an inquiry into whether a specific set of rules that were adopted to promote diversity of viewpoints presented to the public through newspapers and broadcast media should be maintained in light of changes in the communications environment and media markets. In fact, this and other related proceedings[15] actually pose much larger questions not only about the scope of congressional directives, but also about basic principles of democracy articulated in the United States Constitution.

The fundamental question raised by the Commission's review of rules in this proceeding is whether the essence of our democracy, the First Amendment goal of information dissemination from diverse and antagonistic sources—which fuels political participation and

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[11] The Center for Digital Democracy is committed to preserving the openness and diversity of the Internet in the broadband era, and to realizing the full potential of digital communications through the development and encouragement of noncommercial, public interest programming. CDD is online at www.democraticmedia.org.

[12] The Leadership Conference on Civil Rights was founded in 1950, and consists of more than 185 national organizations, representing 50 million Americans that represent persons of color, women, children, labor unions, individuals with disabilities, older Americans, major religious groups, gays and lesbians and civil liberties and human rights groups. LCCR is online at www.civilrights.org.

[13] The Civil Rights Forum on Communications Policy (CRF), a project of the Tides Center, pursues the twin goals of introducing civil rights principles and advocacy to the implementation of the 1996 Telecommunications Act, and to reframe the discussion over the role of media in our society around the needs of communities and the rights of citizens through education, research, and by forging working links between the civil rights community and others. CRF is online at www.civilrightsforum.org.

[14] In the Matter of Cross-Ownership of Broadcast Stations and Newspapers; Newspaper-Radio Cross-Ownership Waiver Policy: Order and Notice of Proposed Rulemaking, MM Docket No. 01-235, 96-197, September 20, 2001 (hereafter, Notice).

[15] *See e.g. National Cable Horizontal Ownership Limit FNPRM,* CS Docket Nos. 98-82 *et al.*, FCC 01-263 (rel. Sept. 21, 2001).

debate about policy, social norms, cultural values, individual aspirations and community needs in our society—can be preserved if broadcasters are allowed to own or be owned by a newspaper in the same community.

Our initial comments provide an overview of the public policy, legal precedent and market conditions that should guide the Commission in evaluating these rules. We believe that when all empirical evidence of current market conditions is combined with careful analysis of the driving economic forces that influence broadcast and newspaper behavior and this information is evaluated in the context of the governing constitutional imperative to promote the widest possible dissemination of information from diverse and antagonistic sources, there is no basis for eliminating the cross-ownership rule. In fact, market data support the need for expanded public intervention to open communications wires and the airwaves to more independent voices in order to preserve our nation's commitment to maintaining institutions and market forces that promote a robust democracy.

The legal burden the Commission faces in this proceeding is formidable—it must affirmatively justify any change to the rule. It may not sit passively awaiting justification of the rule, then relax or repeal the rule because of an incomplete or inconclusive record.[16] This rule has received the endorsement of Congress and has been explicitly reviewed and endorsed by the Supreme Court; the appropriate standard under the Administrative Procedure Act includes a presumption against change, and the biennial review process in no way alters that presumption.

[16] It is now popular to argue that a rule must be "re-justified" if it is to be retained. *See, e.g.*, Ted Hearn, MultiChannel News (April 23, 2001) (citing Chairman Powell stating rules must be "validated or eliminated"). This is not, however, the legal standard by which Commission conduct is governed. The Commission cannot forget that this rule has not only received the explicit endorsement of Congress for many years, [cite, including NPA] implements the prime directive of the Communications Act, but also has been explicitly reviewed and upheld by the Supreme Court. [cite] Few rules possess such a pedigree.

Furthermore, the recent decision of the D.C. Circuit in Time Warner[17] has no bearing on this case, as it is inapplicable to broadcast regulation.

We find that:

- For the purpose of ownership rules, the concept of diversity must involve a dynamic view of civic discourse that goes far beyond merely preventing antitrust harm or promoting economic efficiency.

- Substantial market failure and the uniqueness of newspaper and broadcast market structure make it virtually impossible for a traditional open market "hands-off" policy to meet constitutional goals for media policy.

- The narrow economic orientation that runs throughout the Notice in this proceeding misperceives the nature of civic discourse. The Commission misreads the clear intentions of Congress and the Supreme Court's interpretations of how the First Amendment should promote public debate.

- The Commission's presuppositions that these are dramatic changes in media markets are overstated vastly. These hypotheses ignore fundamental differences between the media in function, finance and impact. Careful analysis of the full array of market changes points to the need for ***greater***, not reduced, public intervention to promote constitutional goals. Broadcasters do not compete against newspapers, particularly in the most significant area addressed by this proceeding—news and information. The growth of other media, including cable and the Internet, have not significantly altered the fundamental divisions between these separate markets. All relevant media markets are highly concentrated, raising concerns about the viability of cross-market competition.

- In pointing to what has changed, the Commission glosses over what has not changed: the continued failure of media markets to represent and serve minorities. This has dramatic implications for full and fair participation of minorities in our democracy.

- Arguments that rely on the emergence of the Internet to justify an end to policies that promote diversity overlook the serious danger that FCC policies are allowing the same entities that dominate other media to dominate the Internet and destroy its open architecture.

- For the Commission to consider the impact of other media on the need to retain a cross-ownership rule, it must evaluate market conditions and levels of

[17] *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (*Time Warner III*).

> concentration involving these other media (e.g. cable TV, national television network financial interest and syndication rights) to understand their impact on local newspaper and broadcast markets. In addition, since the Commission is likely to review the national broadcast ownership cap and broadcast-cable cross-ownership rules in the near future, it must account for any changes in those rules which may affect the newspaper and local broadcast markets.

Our analyses provide a specific answer to the basic question posed in the Notice:

Should restrictions on cross-ownership between newspapers andbroadcasters within the same market be preserved?

The answer is an unequivocal yes.

Newspapers and broadcasters provide different functions in our civic discourse. Allowing cross-ownership will undermine the marketplace of ideas by weakening the institutions that provide in-depth, analysis, opinion and investigative reporting and threatening the unique institutional motivation and perspective that newspapers bring to public debate. These unique contributions have not been replaced by broadcast or other media, and are not likely to be substitutable by other media any time soon. Eliminating rules which keep newspaper and local broadcast television ownership separate would undermine their incentives to serve as checks and balances on each other's business interests and editorial bias, thereby impoverishing, not enriching, civic discourse.

As Justice Brandeis explained in his concurrence in Whitney v. California,

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government. [18]

While broadcast is an important means of getting information for many people, in a fully functioning democracy, broadcast must be supplemented by less-passive information sources.

[18] 274 U.S. 357 (1927).

The kind of "couch potatoism" that broadcast responds to, and possibly fosters, is precisely the danger of an "inert people" which Justice Brandeis foresaw.[19] Couch potatoes staring at the TV set are not enough for democracy to work. If a broadcast/newspaper combination undermines in any way the depth of reporting that newspapers provide, resulting in shallower public debate, that consolidation runs directly counter to the purpose of the First Amendment and democratic process.

In 1945, Justice Black rendered the Supreme Court's opinion in Associated Press v. United States stating that "[the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public…" Since then, no decision has either diminished the Commission's authority, or its responsibility, to ensure the public's access to such information diversity. It is of particular note that the D.C. Circuit's recent Time Warner v. Federal Communications Commission[20] decision in no way alters the Commission's authority and responsibility to protect this diversity principle. That case was about a horizontal cable ownership limit, not the Commission's obligation under the public interest standard; that court in no way challenged Supreme Court precedent in the line of cases following Turner,[21] Associated Press,[22] and Red Lion.[23]

[19] As Professor Yochai Benkler notes, "When a medium central to a polity's information environment (such as broadcast television in our polity) produces only 'safe' materials, it reinforces and makes more predictable the preferences of average consumers. This strengthens the tendency to underproduce information that challenges broadly shared cultural precepts. From a political perspective, this threatens to engender what Justice Brandeis considered 'the greatest menace to freedom': '[A]n inert people.'" *See Yochai Benkler, "Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain."* 74 N.Y.U. L. Rev. 354 (1999).

[20] *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (*Time Warner III*).

[21] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 638-39 (1994)("*Turner I*").

[22] *Associated Press v. U.S.*, 326 U.S. 1 (1945).

[23] *Red Lion Broadcasting v. FCC*, 395 US 367 (1969).

I. PROMOTING CIVIC DISCOURSE REQUIRES PRESERVING DIVERSITY OF OWNERSHIP AND INSTITUTIONAL SOURCES OF INFORMATION

A. FUNDAMENTAL PRINCIPLES

1. CIVIC DISCOURSE IS A DYNAMIC, EVOLVING PROCESS

The broad and expanding view of civic discourse that we take is grounded squarely in constitutional principles, communications law and Supreme Court interpretation of both the Constitution and Communications Act. The language adopted by the Supreme Court in 1945 recognizes that democratic discourse is not a simple target or one-dimensional measure of output, like a balanced budget. In dealing with the print media, the Court adopted an open-ended goal on the theory that newspapers play a critical role in promoting the wide-open debate that freedom of speech under the First Amendment is designed to protect:

> The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[24]

The decision in Associated Press provides the launching point for a penetrating multidimensional view of civic discourse. The Supreme Court has not only repeatedly called for the widest possible dissemination of information from diverse and antagonistic sources but it

[24] Associated Press v. United States, 326 U.S. 1, 20 (1945)

included that goal for mass media technologies and recognized that diversity includes points of view and institutions providing varying depths and breadth of analysis.[25]

Under this dynamic principle, there is no such thing as "enough" democratic discourse. The Supreme Court has interpreted the Constitution in a manner that protects private and public activities that promote the *widest possible* dissemination of information as the goal. There need be no embarrassment in raising the bar as technology improves. When it comes to civic discourse, our nation's democratic principles require that public policy respond to evolving market conditions in a manner that continues to promote the widest possible dissemination of information from diverse and antagonistic sources.

As the means of communications have changed over the course the twentieth century, from print to radio, to broadcast television, to multichannel cable and satellite TV, to interactive digital media, Congress[26] and the Supreme Court[27] have renewed their commitment to diversity and richer civic discourse. At each stage of development, public policy has required that each new means of communications promotes diversity; that policy has sought to preserve a variety of

[26] Congressional actions to further this policy include: in the print media National Newspaper Preservation Act; in Cable TV the Cable Consumer Protection Act. Congressional commitment to this policy is also evident in actions it took to prevent regulatory agencies from eliminating or restricting how they could change the rules attaching language to prohibit the FCC from spending funds in 1989, 1990, 1991, 1992 and 1993 "to repeal, retroactively changes in, or to begin or continue a reexamination of the rules and policies established to administer" the rules (see). The legislative history of the Telecommunications Act of 1996, Publ L. No. 104-104, 110 state 56(1006) included a rejection of an effort to repeal the rules.

[27] Supreme Court decisions that cite or reaffirm this commitment include: in the print media, New York times Co. v. Sullivan, 376 U.S. 254, 266 (1964), Citizens Publishing Co. v. United States, 394, U.S. 131, 139-40 (1969), Buckley v. Valeo, 424 U.S. 1, 49 (1976); in broadcast, Red Lion Co. v. FCC, 395, U.S. 367, 390 (1969), FCC v. National Citizens Comm. For Broadcasting, 436 U.S. 775, 796 (1978); in cable TV, Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622, 663-664 (1994), Turner Broadcasting Systems, Inc. v. FCC, 520, U.S. 180, 189 (1997).

different kinds of media institutions, with differing business models and journalistic cultures, to promote public debate.[28]

It is paramount in this proceeding to maintain focus on broadcast television's and newspaper's role as the most significant sources of local content. When the presence of locally-relevant Internet sites is invoked as the reason for eliminating cross-ownership restrictions, we should remember that much of that Internet content is derived from local newspapers' and local broadcasters' sites. The "efficiencies" that will result from combining newsrooms may not only signify a loss of independent broadcast and newspaper voices, but the loss of online content as well.

Had the Supreme Court not adopted an open-ended goal, it would have been all too easy for public policy to declare victory in the struggle to deepen and defend civic discourse and our democracy would be much poorer as a result. After all, in 1945,[29] when this principle was adopted for the print media, commercial television had not been deployed, less than half (46 percent) of all households had a telephone and just over half (55 percent) of all households had a radio.[30] The public was not well-educated, with only about one in five adults being high school graduates and barely one in twenty hundred being college grads.

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[28] Change is seen as the impetus to this proceeding with the Commission noting that when the rule was adopted the Commission declared that it "is obliged to give recognition to the changes which have taken place and see to it that the rules adequately reflect the situation as it is, not was" (Notice, p. 2). It is obvious that rules must reflect changed circumstances, but what the Commission seems to miss is that the standard may also change.

[29] U.S. Department of Commerce, Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1970* (11975)

[30] The Commission opens its discussion by recounting the change in media outlets since 1975 (p. 1), The longer term perspective is taken here to make the point that a great deal of change had taken place in the three decades before the rule was adopted, perhaps as much or more than has taken place in the almost three decades since. The rules were adopted in spite of an immense amount of change, so that change is itself is not necessarily a basis for refusing to adopt rules. At the Roundtable On FCC Ownership Policies
October 29, 2001, Stanley Bessen incorrectly asserted that simply because rules had not changed, they could not be right. The argument is wrong for two reasons. First, the correct basis of a rule has nothing to do with its age. Second, the rules have been modified substantially over time.

By 1970, however, a few years before the broadcast-newspaper rules at issue in this proceeding were adopted, there were many more sources of information and we were a much better educated people. Twice as many people had telephones (91 percent). Radios were still in half of all households (47 percent), but almost an equal number of households had television (45 percent), and one in 12 households already had cable (8 percent). People were much better educated too, with almost half (44 percent) having graduated high school and more than one-in-nine having graduated college.

If some absolute standard of information availability and human intellectual capacity had been adopted by the Supreme Court in 1945, then by 1970 the goal would have certainly been achieved. Because they viewed civic discourse as a moving target that expands to enrich our democracy as technology opens new possibilities, neither the Supreme Court, nor the Congress saw it that narrow way.

Again today, some want to declare victory in the struggle to enrich democratic discourse and abandon the public policies that promote diversity of ownership and viewpoints. In the first year of a new century with a dramatic new communications technology spreading, they propose to roll back existing policies that are intended to accomplish this goal.

After all, today not only do 98 percent of all households have a television and about 95 percent have a telephone, but over 80 percent have a multichannel video service and more than half have the Internet at home. [31] Over 80 percent of adults have graduated high school and one-quarter have completed college. With hundreds of TV channels available and the ability to link to a global network of computers and other communications devices there cannot possibly be any concern for a lack of diverse and antagonistic sources of information. Enough is enough, they argue. We do not need public policy to ensure diversity, just let private parties in the marketplace decide who gets to speak using which technologies.

Yet neither the Supreme Court nor Congress has been willing to reduce civic discourse to simple economics. A narrow, economically-driven view of civic discourse misreads the aspiration of the First Amendment as interpreted by the Supreme Court for more than half a century. The Constitutional and legislative basis of media ownership rules was never rooted solely in an economic argument or principle. Eliminating cross-ownership rules that have promoted diverse and antagonistic sources of information will not only forego the opportunity to make a substantial advance in the quality of public debate, but it risks diminishing the quality of civic discourse. Failing to strengthen civic discourse in the face of powerful new technologies could dramatically reduce the capacity for the enlightened debate that the Supreme Court has determined is essential to American democracy.

2. CIVIC DISCOURSE CANNOT BE REDUCED TO COMMERCIALLY DRIVEN ENTERTAINMENT VARIETY

Civic discourse is more than economic efficiency. Justice Frankfurter, concurring in Associated Press, made this much clear:

> A free press is indispensable to the workings of our democratic society. The business of the press, and therefore the business of the Associated Press, is the promotion of truth regarding public matter by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts and potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect.[32]

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[31] U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the United States: 2000,*
[32] Associated Press, 326, U.S. at 17.

Congress has repeatedly declared, and the Supreme Court repeatedly upheld, principles for communications media that go far beyond simple economics. Economic efficiency is but one consideration among many and is not more effective in achieving a multiplicity of viewpoints than other public policy tools. Moreover, it is clear that reliance on commercial market forces alone will not assure the opportunity for diverse points of view to be heard through the print and broadcast media.

Even if the economic media marketplaces were composed of significant numbers of small firms competing aggressively with one another, an unfettered commercial mass media market might not lead to a vibrant marketplace of ideas that our Constitution attempts to promote; diverse sources of information are not the object of commercial competition. Profit maximization in increasingly centralized media conglomerates promotes standardized, lowest common denominator products that systematically exclude minority audiences and unpopular points of view, eschew controversy, and avoid culturally uplifting but less commercially attractive content. It favors entertainment at the expense of information. We believe that the Federal Communications Commission cannot reduce its obligation to promote diversity and the public interest to simple economic considerations, even where the economic marketplace is working.

Owen Fiss articulates this point well:

> … the market brings to bear on editorial and programming decisions factors that might have a great deal to do with profitability or allocative efficiency (to look at matters from a societal point of view) but little to do with the democratic needs of the electorate. For a businessman, the costs of production and the revenue likely to be generated are highly pertinent factors in determining what shows to run and when, or what to feature in a newspaper; a perfectly competitive market will produce shows or publications whose marginal cost equals marginal revenue. Reruns of *I Love Lucy* are profitable and an efficient use of resources. So is MTV. But there is no necessary, or even probabilistic, relationship between making a profit (or allocating resources efficiently) and supplying

> the electorate with the information they need to make free and intelligent choices about government policy, the structure of government, or the nature of society. This point was well understood when we freed our educational systems and our universities from the grasp of the market, and it applies with equal force to the media.
>
> None of this is meant to denigrate the market. It is only to recognize its limitations. The issue is not market failure but market reach. The market might be splendid for some purposes but not for others. It might be an effective institution for producing cheap and varied consumer goods and for providing essential services (including entertainment) but not for producing the kind of debate that constantly renews the capacity of a people for self-determination.[33]

To the extent that economics is a consideration, economic competition in commercial mass media markets cannot assure diversity and antagonism. It has long been recognized that the technologies and cost structure of commercial mass media production are not conducive to vigorous, atomistic, competition. Print and broadcast media have unique economic characteristics. On the supply side they require substantial fixed costs, and on the demand side they involve very strong consumer preferences (inelasticity), and very little substitutability to meet consumers' tastes. The development of media markets allowed by recent relaxation of rules restricting the accumulation of economic market power reveals that they are anything but atomistically competitive – rather, they are evolving toward tight, differentiated oligopolies. Each time a structural rule is lifted, and increase in concentration and reduction in the number of independent voices takes place.

Prof. Baker elucidates this point:

> Monopolistic competition theory applies to media goods. They, like utilities, characteristically manifest the "public good" attribute of having declining average costs over the relevant range of their supply curves due to a significant portion of the product's cost being its "first copy cost," with additional copies having a low to zero cost. There are a number of important attributes of monopolistic competition that are relevant for policy analysis and that distinguish it from the standard model of so-called pure

[33] Fiss, Owen. *"Essays Commemorating the One Hundredth Anniversary of the Harvard Law Review: Why the State?"*

> competition, the standard model that underwrites the belief that a properly working market leads inexorably to the best result (given the market's givens of existing market expressed preferences and the existing distribution of wealth). The first feature to note here is that in monopolistic competition often products prevail that do not have close, certainly not identical, substitutes. Second, this non-substitutability of the prevailing monopolistic product will allow reaping of potentially significant monopoly profits. . . . . .within this type of competition, products' uniqueness or monopoly status often permits considerable margin for variation while still remaining profitable. The "potential" profit of the profit maximizing strategy can be realized and taken out as profit—which is what the corporate newspaper chains are accused of doing. However, the market itself does not require the profit maximizing response as it does in a model of pure competition. Rather the potential profit can instead be spent on indulging (or "subsidizing") the owners' choices about content or price.[34]

We believe that civic discourse is not primarily about entertainment and not primarily about variety or the number of outlets. Civic discourse is about information from diverse sources, particularly taking ownership into account. Multiple outlets with single owners are only one voice. Entertainment is only one consideration among many and carries little importance in promoting democracy.

The Federal Communications Commission cannot reduce its obligation to promote diversity and the public interest to a count of entertainment programs available.

3. INSTITUTIONAL DIVERSITY PLAYS A CRITICAL ROLE IN CIVIC DISCOURSE

Institutional diversity—different media business models, with different cultural and journalistic traditions—plays a special role promoting civic discourse. Unique perspectives provided by different institutions are highly valued as sources of information. Judge Learned Hand painted a picture of diversity that was properly complex, noting that a newspaper "serves

[34] C. Edwin Baker, *"Giving Up on Democracy: The Legal Regulation of Media Ownership."*

one of the most vital of all general interests: the dissemination of news from many different sources, and with as many different facets and colors as possible."[35]

A recent law review article describes the discussion of diversity of sources in the Associated Press case as follows:

> [I]t is problematic, or as Judge Learned Hand asserted "impossible," to treat different new services as "interchangeable…" A newspaper reflects the biases and views of its writers, editors, and perhaps owners. One newspaper may downplay and truncate a news wire story, while the other newspaper may carry it as a headline. These are non-fungible commodities. Thus, the marketplace is not about consumers switching from one homogenous product to another. Rather, it is the net increase in consumer welfare from having many competing news sources and editorial voices. As Judge Hand aptly stated about the marketplace of ideas – and it bears repeating – "it is only by cross-lights from varying directions that full illumination can be secured. Unlike restraints on ordinary commodities (where consumers may turn to less-desirable alternaties but the overall societal impact is not significant), for restraints in the media, the alternative may be inherently unsatisfactory and the costs imposed on society may be significant.[36]

A narrow view that all media information is fungible fails to recognize the unique role of newspaper reporting as a fourth estate, checking waste, fraud and abuse of power by governments and corporations. It ignores the difference between national and local news markets and the tendency of nationally oriented media, which maximize profit by presenting programming attractive to national audiences and national advertisers to homogenize the local point of view out of existence.

> These courts have recognized that news comes from many sources: newspapers, television, radio, magazines and more recently the Internet. These sources all arguably compete for the public's attention. But these courts have found that both the format and nature of information in local daily newspapers distinguish them from news and entertainment provided by other sources. Daily local newspapers provide a "unique package" of information to their readers. National newspapers lack the local news and advertising. Radio and television are primarily dedicated

[35] Associated Press, 52 F. Supp. At 372.
[36] Stucke and Grunes,

> to entertainment and their news content lacks the breadth and depth of daily newspapers.[37]

In addition, it is critical to realize the ways in which these media provide checks and balances against each other. As Ben Bagdikian (former Dean of the Graduate School of Journalism at the University of California at Berkeley) notes:

> In most major markets, local newspapers regularly print critical reviews of local television station programs. The reverse is true in periodic broadcast station reporting and commenting on a newspaper in the same market under different ownership.
>
> It has been the experience of many observers, including this writer's, that this cross-media mutual criticism and evaluation becomes minimal when both the local newspaper and a local broadcast station come under common ownership. In fact, a corollary effect is that far from offering mutual criticism, the two media under common ownership use this to have each of its properties, i.e. the newspaper and the broadcast station, to become promotional media publicizing the other subsidiary, to the exclusion of similar positive notification of competing newspaper and/or broadcast stations.[38]

Furthermore, the most important effect that institutional diversity plays may be its deterrent effect on negative behavior. As Baker notes:

> Different ownership distributions may also differ in ways that provide positive externalities that are not well described as involving differences in the actual normal content of media products. One example is the value that dispersal of ownership may create in respect to what could be described as *potential* content. The (disputable) value of a nuclear arsenal lies not in its actual use but in the protection (the deterrence) its potential use supposedly provides. A society's capacity to maintain its democratic bearings or its ability to resist demagogic manipulation, *may* be served by a broad distribution of expressive power, especially media-based power. Such a distribution may be harder for a demagogue to manipulate or control or may be better able to deter political abuses because of being more difficult to control. On this account, the value of a wide distribution of media ownership lies not in any particular media product that this ownership produces on a day to day bases (such that the value will be reflected in market sales) but the democratic safeguards that this ownership distribution helps provide.[39]

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[37] Stucke and Grunes, p. 273.

[38] Statement of Ben Bagdikian, *In the Matter of Cross Ownership of Broadcast Stations and Newspaper; Newspaper/Radio Cross-Ownership Waiver Policy* (MM Docket Nos. 01-235, 96-197) (See Appendix A).

[39] C. Edwin Baker, *"Giving Up on Democracy: The Legal Regulation of Media Ownership."* (2001).

4. THE NEED FOR MORE ROBUST CIVIC DISCOURSE INCREASES WITH THE GROWTH OF MORE POWERFUL COMMUNICATIONS TECHNOLOGIES

The simplistic economic approach that counts variety of entertainment outlets and variety of channels takes a unidimensional view of output that fails to consider whether there is a need for more effective means of public debate. If citizen participation in civic discourse is to continue to be or become more effective, a substantial improvement in the means of communications at the disposal of the public—far beyond commercial mass media influences—must be promoted through public policy.

While it is certainly true that there is a great deal more information available to more educated citizens, it is also true that they need more information. The same changes in the information environment that have made the development of more complex and rapid communications possible also make it more difficult for citizens to comprehend and respond effectively to new conditions. As the world becomes a more complex place, the need for diverse sources of information becomes more important. Globalization of the economy and communication networks, mobility and social fragmentation place greater demands on the communications network to enable citizens to be informed about increasingly complex issues and express their opinions more effectively in civic discourse.

The power of digital communication will be greatly enhanced by improved video images with impact heightened by real-time interactivity and personalized ubiquity. Dramatic increases in the ability to control media messages could result in a greater ability to manipulate and mislead rather than a greater ability to educate and enlist citizens in a more intelligent debate. The Commission must not become so mesmerized by the new technology that it loses sight of the Supreme Court's directive to ensure that diverse and antagonistic sources of information can use such technology to preserve the democratic process.

Associated Press certainly expressed a concern about the sheer size of news organizations and the influence that could result.[40] The size of media organization presents a growing mismatch between those who control media organizations and average citizens.[41]

The new distribution technologies are still controlled by the giants of the commercial mass media. The technologies of commercial mass media are extremely capital intensive and therefore restrictive of who has access to them. A small number of giant corporations interconnected by ownership, joint ventures and preferential deals now straddle broadcast, cable and the Internet. Access to the means of communications is controlled by a small number of entities in each community and distribution proprietors determine what information the public receives. Individual members of society need new communications skills and access to technology to express themselves and evaluate the information presented by more powerful messagers.

5. THE GROWTH OF DIGITAL COMMUNICATIONS HAS NOT TRANSFORMED THE DOMINANT MEANS OF CIVIC DISCOURSE

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[40] Stucke and Grunes

> Nor did the majority of the justices jump through the typical hoops of defining a relevant market, determining market share and the restraints' impact on price and examining issue of entry or expansion by the other news wire services. Rather the majority was satidifed that AP was sufficiently large to impact the marketplace of ideas, in that it was "a vast, intricately reticulated, organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of prime consequence."

[41] Sullivan, Lawrence, "Economics and More Humanistics Disciplines: What are the Sources of Wisdom for Antitrust, 125,

> Americans continue to value institutions the scale and workings of which they can comprehend. Many continue to value the decentralization of decision making power and responsibility. Many favor structures in which power in own locus may be checked by power in another.

At this point in time, the hope that new technologies will strengthen civic discourse is just that—a hope. Claims that dramatic changes have already rendered policies to promote diversity obsolete are premature. There has been far less fundamental change in the marketplace of ideas than meets the eye.

We find very clear evidence that different types of media—in this case, print and broadcast—represent distinct product and geographic markets. While the advocates of convergence equate all media, the reality is that different media serve different needs, have different content, and differ widely in their impact and effect. People use different media in different ways, spend vastly different amounts of time in different media environments, consume services under different circumstances and pay for them in different ways. In economic terms, these are separate markets with weak substitution effects. As a result, competition between the media is muted in the marketplace and, in some respects, the specialization of each is worth preserving because of the unique functions provided in the marketplace of ideas.

While there has been an increase in non-primetime cable TV viewing, the big three networks are still "primetime programming juggernauts." The addition of four new broadcast networks that provide little news and public interest programming has not altered the fact that the big three networks still account for the overwhelming majority of high impact news and information shows – 80 or 90 percent.

Nor has the overall commercial media marketplace changed to any significant degree. Network broadcast TV is predominantly national, accounting for 60 percent of national advertising revenues; newspapers are local, accounting for 60 percent of local advertising revenues. There has been little change in advertising market shares. In 1985, broadcast accounted for a tad less than one-third of all advertising dollars spent on these media; in 2000, broadcast accounted for a little more than one-third of all advertising dollars. In 1985, newspapers accounted for just over one-half of all advertising dollars; in 2000, they accounted for just under one-half. In 1985, radio accounted for one-seventh of advertising; and in 2000 it accounted for one-seventh.

In 1985, the Internet was just beginning its commercial phase, accounting for virtually no viewing time or advertising revenue. Fifteen years later, it accounts for only 4 percent of total viewer time and less than two percent of advertising dollars. The Internet revolution has provided a wonderful new functionality that allows people to conduct commercial transactions and daily activities in a more efficient manner, but has not yet significantly altered the dynamics of mass media. It provides little if any local content. It does not provide independent voices or balance the immense power of traditional mass media to influence public opinion, particularly when public policy has allowed existing media owners to increasingly control the communications infrastructure underlying the Internet and to direct the flow of information on the Internet.

Within each of the media market segments, we find increasing concentration, corporatization and conglomeration. Each of the market segments is becoming dominated by a small number of large, vertically integrated corporations that pursue profit maximization at the expense of professionalism in journalism and public interest programming. Economies of scale create barriers to entry, particularly in the provision of network facilities. Inadequate rules of fair access have allowed vertically integrated companies to leverage their control over facilities into content markets. As a result, potentially vigorous competition in content markets has been dampened by the much weaker competition in distribution markets.

Rather than eliminate the broadcast-newspaper cross ownership rule, we believe the Commission should take action to prevent recent trends in horizontal consolidation and vertical integration from reducing the independent media voices and opportunities for public debate that are critical to our democracy.

Beyond market structure, it is most important for the Commission to take account of the importance of diversity of ownership and viewpoints to make our Constitution meet the Founding Fathers' goals. Media serve a much larger role than meeting individual consumers' preferences; in order to serve the goals of democracy and freedom of the press as articulated by the Constitution, media must also serve to enable consumers to function as informed citizens in our society:

> Many constitutional provisions merely set up the structure of government and, in a sense, carry out various housekeeping tasks. The Constitution, for example, determines the number, minimum age, and term length of members of the House. In addition to these setting-up-government tasks, other provisions provide guarantees or protections for fundamental individual rights, which I just suggested is not the key to the Press Clause because it refers generally to collective entities such as newspapers or broadcasters, not to individuals. Finally, some provisions are designed to make the structure work both better and more legitimately. Provisions specifying a separation of powers and federalism fit this rubric. Building on the observation that a free press is almost universally recognized as an essential element of democracy, a "fourth estate," the Press Clause should be interpreted in a manner directed to furthering the legitimacy and effectiveness of democratic government. In that respect, the Press Clause can be seen as crucially "for the citizen." So the answer seems to be: "the press" is for the people. The institution's freedom is valued for its contribution to the people in both their roles as consumers and citizens. However, the constitutional guarantee of "freedom of the press" is for the citizen.[42]

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[42] C. Edwin Baker, Media, Markets and Democracy (New York: Cambridge University Press, 2002) (hereafter Markets).

B. LEGAL IMPERATIVES

1. THE COMMISSION MAY NOT DECREASE ITS LEGAL BURDEN TO JUSTIFY AMENDMENT OR REPEAL OF THE CROSS OWNERSHIP RULE.

The Commission may not forget that it is bound by its own precedent and the Administrative Procedure Act, which require it to logically and factually support its decision-making. It is now popular to argue that a rule, particularly an ownership rule, must be "re-justified" if it is to be retained. *See, e.g.*, Ted Hearn, MultiChannel News (April 23, 2001) (citing Chairman Powell stating rules must be "validated or eliminated"). This is not, however, the legal standard by which Commission conduct is governed. Gratifyingly, the Commission appears interested in collecting a detailed record to justify its decision in this docket. *See, e.g.,* Separate Statement of Commissioner Copps, *Newspaper/Broadcast NPRM*, MM Docket Nos. 01-235, 96-197 (Sept. 20, 2001) (noting agreement on a need for a solid factual record). But the Commission may not sit back and await justification, and then relax or repeal the rule because it concludes the record is incomplete or inconclusive. The Commission cannot forget that this rule has not only received the explicit endorsement of Congress for many years, *see Notice* at n.12, implements the prime directive of the Communications Act, and also has been explicitly reviewed and upheld by the Supreme Court. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"). Few rules possess such a pedigree.

The Commission faces no small burden: it must affirmatively justify any change. It may not simply state generally that "times have changed" and conclude the rule is no longer relevant. To quote the Supreme Court, "the forces of change do not always or necessarily point in the direction of deregulation. ... [T]here is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42, 103 S.Ct. 2856, 2866 (1983). As we show in these Comments, the changes in the media marketplace and the marketplace of ideas, and Congress' and the FCC's actions in deregulating much of the marketplace actually increase the effectiveness and need for the cross-ownership rule.

a. The Appropriate Standard under the Administrative Procedure Act Includes a Presumption *Against* Change.

The Commission is considering whether to alter a 25 year-old rule. This decision is governed by the Administrative Procedure Act. 5 U.S.C.. 706(2)(A). The change of a pre-existing rule is governed by the standard set forth by the Supreme Court in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856 (1983) ("*State Farm*"). Close attention to the Supreme Court's analysis in *State Farm* is warranted in this proceeding:

> Revocation constitutes a reversal of the agency's former views as to the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." .... *Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.*
>
> .... [T]he forces of change do not always or necessarily point in the direction of deregulation. *In the abstract, there is no more reason to presume that changing circumstances require the rescission of prior action, instead of a revision in or even the extension of current regulation.* If Congress established a presumption from which judicial review should start [in the Administrative Procedure Act], *that presumption ... is ... against changes in current policy that are not justified by the rulemaking record.*

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-42, 103 S.Ct. 2856, 2866 (1983) (emphasis added). The Commission cannot relax or eliminate the cross-ownership rule unless it demonstrates, against a presumption that the prior course is valid, the wisdom of a new approach.

b. The Most Recent *Time Warner* Decision Does Not Alter the Commission's Responsibility in this Proceeding.

The Commission seeks input on the relevance of *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (*Time Warner III*) to this proceeding. *NPRM* at ¶¶ 31-33. In *Time Warner III*, the D.C. Circuit rejected the Commission's justification for the national cable ownership cap. *Id.* at 1130. The D.C. Circuit's analysis departed from the will of Congress and Supreme Court precedent in requiring the Commission to produce significantly more evidence than required to justify the national cable cap. Baker Appendix at 12-13; *see also* Petition for Writ of Certiorari, *Consumer Federation of America v. FCC*, No. 01-223 (August 2001). Regardless of the wisdom of this decision, however, *it is not applicable to broadcast regulation*. The Commission's decision to seek comment on this question without reference to basic difference in constitutional standards is disconcerting.

Thus, CU *et al.* are pained to remind the Commission that broadcast regulation is evaluated under the First Amendment standard enunciated in *Red Lion. See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 638-39 (1994)("*Turner I*"); *Tribune Co.*, 133 F.3d at 69 (observing that *Red Lion* still "rules the broadcast jungle") whereas the national *cable* cap in *Time Warner III* is subject to review under the higher standard of intermediate scrutiny enunciated in *Turner I and II*. *TWE v. FCC*, 240 F.3d at 1129.[43] The remainder of D.C. Circuit's analysis was predicated on its analysis of a particular provision of the 1992 Cable Act, which the D.C. Circuit concluded is centrally concerned with economic competition. *TWE v. FCC*, 240 F.3d at 1135-36. The cross-ownership rule, as shown definitively below, is centrally premised on the First Amendment diversity principles. *See FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795-99 (1978)("*NCCB*").

For these reasons, the Commission cannot rely upon *Time Warner III* to justify relaxing or repealing this rule on the grounds that the evidence before it is inconclusive. Only affirmative proof that the rule must be changed to serve the Commission's goals will pass muster.

c. The Biennial Review Provisions Do Not Change the Standard of Review.

The FCC's statutorily-mandated Biennial Review process also affords no basis for altering the standard. *See* 47 U.S.C. § 161; Telecommunications Act of 1996, Pub. L. No. 104-104, §202(h), 110 Stat 56, 112 (1996) ("§ 202(h)"). That statute directs the FCC to review its various regulatory obligations with a view towards lifting or relaxing rules which have become obsolete or unnecessary. *Id.* Section 202(h) requires the FCC to regularly re-evaluate its ***entire***

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[43] The Supreme Court has repeatedly emphasized that there is no unqualified First Amendment right to a broadcast license. *NCCB*, 436 U.S. at 799; *Red Lion*, 395 U.S. at 389; *NBC*, 319 U.S. at 226-27. While a broadcaster's actual speech activity is entitled to broad First Amendment protection, *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998); *FCC v. League of Women's Voters of California*, 468 U.S. 364 (1984), an FCC prohibition on ownership of a license on the basis of neutral criteria does not, under applicable Supreme Court precedent, give rise to a First Amendment claim. *NCCB*, 436 U.S. at 799, *NBC*, 319 U.S. at 226-27. To the contrary, the Supreme Court has expressly held that the Commission has the authority to order divestiture of licenses in the name of diversity, and that doing so "enhance[s] the diversity of information heard by the public without ongoing government surveillance of speech." *NCCB*, 436 U.S. at 801-02 (citations omitted). Such restrictions "do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them." *Id.*

broadcast regulatory scheme as an organic whole, to determine whether ***any*** rules are "no longer necessary in the public interest as the result of meaningful economic competition between providers of such service." *Id.* at § 161(a)(2).

By focusing on "the public interest," Pub. L. No. 104-104, § 202(h), the biennial review clearly encompasses diversity concerns. In upholding the very rule under consideration in this proceeding, the Supreme Court held "the 'public interest' standard necessarily invites reference to First Amendment principles," and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978) (citations omitted). A wide array of holdings confirm the FCC's public interest authority includes the duty to ensure that the public has access to diverse sources of information. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604 (1981); *United States. v. Storer Broad.*, 351 U.S. 192, 203 (1956); *Nat'l Broad. Co. v. U.S.*, 319 U.S. 190, 216 (1943); *Nat'l Cable Television Ass'n, Inc. v. FCC*, 747 F.2d 1503, 1506 (D.C. Cir. 1984).

2. CHANGES TO THE NEWSPAPER/BROADCAST CROSS OWNERSHIP CANNOT BE JUSTIFIED WITHOUT REFERENCE TO OWNERSHIP DIVERSITY OR STRUCTURAL INDEPENDENCE.

a. No First Amendment-Relevant Diversity Exists Independent of Ownership Diversity and Structural Independence.

The Commission seeks comment with respect to its varying theories of diversity. *Notice* at ¶¶ 16-17. When first adopting the cross-ownership rule, the Commission considered First Amendment concerns paramount. *Second Report and Order*, 50 F.C.C.2d 1046 at ¶¶ 34, 110 (rule "draws its support principally from our First Amendment concern.") The Commission provided this reasoning:

> The premise is that a democratic society cannot function without the clash of divergent views. It is clear to us that the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility. If our democratic society is to function, nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible. .... [I]t is a recognition that it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their view points cannot be expected to be the same as if they were antagonistically run.

Id. at ¶ 111. The Supreme Court affirmed the elevation of the First Amendment standard as the primary animus behind the rule because it promotes of long-standing FCC policies and constitutional principles. *NCCB*, 436 U.S. 775, 793-96,798-802. The Court upheld the rule even though, in its view, the Commission had concluded that "increases in diversification would possibly result in enhanced diversity of viewpoints and ... 'even a small gain in diversity' was 'worth pursuing.'" *Id.* at 786.

Because the First Amendment is centrally concerned with obtaining a wide range of diverse viewpoints to fuel civic discourse, the Commissiom's ownership and broadcast policies are virtually always justified with reference to achieving the goal of "viewpoint" diversity. The First Amendment pedigree is what gives these concerns their validity. As powerfully shown above in these Comments, the First Amendment is concerned with educating the citizen so that she may ably engage in her role in democracy. Through exposure to many viewpoints, she may make up her own mind as to the correct policies of the day. *See supra* Part I.A.

Nothing in First Amendment analysis, the origin of the Commission's diversity goals, supports mere program variety as a legitimate goal. The Commission has always been careful to avoid direct interference in content at such a granular level. *See, .e.g, Use of "Rerun" Material*, 61 F.C.C.2d 946 at ¶ 11 (1976); *Red Lion*, 395 U.S. at 396. Such an analysis would be akin to arguing that the constitution requires an urban contemporary radio format and was soundly rejected by the Supreme Court. *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 101 S.Ct. 1266, 67 L.Ed.2d 521 (1981); *see also CBS v. DNC*, 412 U.S. 94, 110, 93 S.Ct. 2080 (1973); *Turner I*, 512 US 622, 650. The Commission's goals are instead, rooted in the structural independence of the viewpoints.

b. The Commission's Approach to Diversity Wrongly Separates Ownership Diversity from Other Diversity.

While considerations of diversity are certainly complex and subtle, the Commission has, over time, overly confused its diversity analysis by attempting divide up diversity into subgroups and has implied that these diversity sub-groups could be pursued independent of ownership diversity or structural independence. No First Amendment-relevant diversity may exist independent of these concerns.

The most recent source of this confusion stems from the Commission's pursuit of deregulation in the name of increased variety. The Commission's framework can best be understood with reference to a detailed *Notice of Proposed Rulemaking* the Commission released in 1995 canvassing Commission precedent in order to formulate a more systematic approach to policymaking. *Review of the Commission's Regulations Governing Television Broadcasting Television Satellite Stations Review of Policy and Rules*, 10 FCC Rcd 3524 (1995) ("*1995 NPRM"*). In that document, the Commission concluded that its diversity policies could best be divided into three categories: viewpoint diversity, outlet diversity, and source diversity. *1995 NPRM* at ¶¶ 57, 61. Under the Commission's analysis, viewpoint diversity had historically been pursued via two mechanisms. Under the "direct" approach, all broadcasters were required to provide minimum amounts of certain types of nonentertainment programming. Structural ownership rules constituted the "indirect" approach of promoting viewpoint diversity. The Commission further stated that structural regulations to promote viewpoint diversity also promoted the other two types of diversity--outlet and source. It identified outlet diversity as the variety of delivery mechanisms that select and present (or "filter") programming. Source diversity promotes a wide range of program producers, separate from how that program is eventually delivered to the public. *Id.* at ¶ 61. Finally, the *1995 NPRM* described newer theories of diversity, postulated first in the 1980s, that claimed "the greater the concentration of ownership, the greater the opportunity for diversity of content," which, as shown below, is flawed for several reasons.

At bottom each of the diversity categories relies upon the conclusion that the public requires multiple, differently-controlled, entities filtering and/or producing content in order to serve the First Amendment. For example, outlet diversity, according to the Commission, seeks to increase the number of entities "that select and present programming directly to the public."[44] It makes reference to a wide array of editors and content packagers. This function, however, cannot produce independent viewpoints unless each packager or outlet is independently owned. The D.C. Circuit recognized this when it upheld a Commission decision rejecting a licensee in part because it owned one of three newspapers in a community. The court stated, "[i]nherent in [the Commission's public interest application of the *Associated Press* First Amendment goal of

[44] The concept of institutional diversity, which we introduce below, can be seen as a variant on ownership diversity. Institutional diversity, in the context of this rule, explains that some outlets, *e.g.*, newspapers, possess unique characteristics and approaches in how they go about their business. This diversity must also be preserved, but it is, like other concepts of diversity discussed here, meaningless without diverse ownership. *See infra* Part II.3.

diverse and antagonistic sources] is the realization that news communicated to the public is subject to selection and, through selection, to editing, and that in addition there may be diversity in method, manner and emphasis of presentation." *Scripps-Howard Radio v. F.C.C.*, 189 F.2d 677, 683 (D.C. Cir. 1951).

Source diversity is also meaningless unless the sources are structurally independent.[45] Source diversity references the same fundamental principle--a distinct entity should be responsible for creating content. The First Amendment is served when independent organizations make decisions about what content will be produced, and thus what content will ultimately reach an audience. Source diversity thus makes no sense without separately *owned* sources and distribution mechanisms. Market power in program and content purchasing will eliminate diversity in program production through the exercise of monopsony power. Sources should not only be separate from each other, but also be separate from outlets to prevent the harms of vertical integration.

Thus, we disagree with the present *NPRM*'s conclusion that the Commission has focused on ownership diversity over outlet diversity because the former produces diversity of viewpoint. *Notice* at ¶16. All relevant First Amendment diversity depends on ownership diversity. The preeminence of ownership is firmly rooted across many areas of the law--for example, in First Amendment jurisprudence,[46] antitrust analysis,[47] and theories of agency.[48]

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[45] This structural independence is analogous to ownership diversity. However, when speaking of sources, which can be individuals, labeling them "differently owned" could be problematic.

[46] The Supreme Court observed in *Metro Broadcasting*, with reference to the Newspaper/Broadcast Cross-ownership rule, that the link between ownership and viewpoint is logical because "'ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation. . . ." *Metro Broadcasting*, 497 U.S. at 571 n.16 (1990).

[47] In antitrust, jointly owned companies cannot "conspire" with one another. "[T]wo or more legally separate and distinct entities are not distinct for purposes of antitrust law if they are not 'independent sources of economic

c. Prior Commission Decisions Ignoring Ownership Diversity Rely Upon a Flawed Theory.

At various times in the past the Commission has tried to separate diversity from ownership diversity by concluding that increased concentration would produce more diversity. *See, e.g., 1999 TV Ownership Order*, 14 FCC Rcd. 12,903 at ¶ 22 (1999); *1992 Radio Ownership Order*, 7 FCC Rcd 2755 at ¶ 21(1992). The concept behind this approach was explained in detail in the *1995 NPRM*:

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power ... pursuing separate interests.'" *Copperweld v. Independence Tube Corp.,* 467 U.S. 752, 771, 104 S.Ct. 2731, 2741, 81 L.Ed.2d 628 (1984).

[48] For example, a master is subject to liability for the torts of his servants committed while acting in the scope of their employment. Restatement 2d of Agency § 219; *see, e.g., Petrousky v. U.S.*, 728 F.Supp. 890, 897 (N.D.N.Y.1990) (holding rule of agency means that employer liable for libelous action of employee).

> Under this view, where there are competing parties, each of their strategies would be to go after the median viewer with "greatest common denominator" programming, leaving minority interests unmet. But where one party owned all the stations in a market, its strategy would likely be to put on a sufficiently varied programming menu in each time slot to appeal to all substantial interests.

1995 NPRM at ¶ 63.

This theory is wrong for several reasons. First, as described above, increases in variety have no relevance to First Amendment principles. Second, as the economic analysis described below demonstrates, even if an increase variety were a legally and constitutionally sanctioned outcome, the economic characteristics of media mean that a significant loss in diversity leads to only a small increase in variety. *See infra* Part II.A.3**.** Finally, as shown in the next section, attention to variety leads to the FCC into waters that the rule's most vehement opponents insist is constitutionally suspect.

d. Analysis Supporting Consolidation Because It Produces Variety is Inconsistent With Oft-Repeated Industry Opposition to Content-Related Rules.

Of all touchstones that are most revered by those who oppose Commission-imposed ownership rules, the most paramount is that the Commission should not become involved in questions of taste and content. The Commission has indicated that "direct" regulation to produce a diversity of viewpoints is not favorable because it is the most threatening to our First Amendment values. Media owners have vociferously protested any Commission policy that even looks at the content they provide.[49]

[49] For example, broadcasters recently excoriated the Commission for a proposal that would require digital television broadcasters to track the number of hours they transmit of various public interest programming types. *See, e.g.*, *NAB Comments* at 36-38 (filed in MM Docket No. 99-360, March 27, 2000); *CBS Comments* at 31-34 (filed in MM Docket No. 99-360, March 27, 2000).

It is important to note that CU *et al.* do not believe regulation with reference to certain classes or categories of programming is inconsistent with the First Amendment. [50] The point here is that those who seek to justify alteration or repeal of the cross-ownership rule because it will produce a wider variety of programming cannot do so without doing violence to their own logical constructs and values. Such a rationale subjugates the very First Amendment values upon which they so often rely.

3. CONGRESSIONAL DIRECTIVES PROMOTE DIVERSITY

Over the course of time, Congressional directives continue to support diversity. The 1996 Telecommunications Act, Pub. L. No. 104-104, a landmark consideration of this country's communications policy that significantly relaxed ownership limits, nonetheless takes directs the Commission to pursue both competition and diversity. For example, as the Commission has noted, even when Congress eliminated the national radio ownership caps and altered the local radio ownership caps:

> Although these amendments significantly relaxed these rules, they nevertheless maintained a set of radio ownership limitations. Congress promoted diversity separate and apart from competition. Indeed, Section 202(b) of the 1996 Act, which sets forth the new limitations, is titled "Local Radio *Diversity*." Moreover, in discussing the radio-television cross-ownership rule, the Conference Report to the 1996 Act noted "the potential for public interest benefits of [radio-television station combinations] *when bedrock diversity interest[s] are not threatened*," and further stated that in reviewing this rule the FCC should take into account not only the increased competition facing broadcasters but also "the need for diversity in today's radio marketplace."

They alleged that such a requirement would "raise First Amendment concerns," NAB Comments at 37, and that they would withhold or condition a government benefit or subsidy on compromising their First Amendment rights, CBS Comments at 33-34.

[50] To the contrary, CU *et al.* have often supported FCC policies designed to ensure that citizens are exposed to a diversity of viewpoints that make reference to broad categories of content or with reference to categories that a broadcaster itself selects.

See 1999 Local Broadcast Ownership Order at ¶20 (emphasis in original) (citing Pub. L. No. 104-104, 110 Stat. 56, 110 (1996), and S. Conf. Rep. 104-230, 104th Cong. 2d Sess. 163 (1996)). The 1992 Cable Act also demonstrates Congress' concern with diversity. For example, under the 1992 Act, national policy is to "promote the availability to the public of a diversity of views and information through cable television and other video distribution media." 1992 Cable Act, §2(b)(1); *see also id.* §§2(a)(6), 2(a)(4). Congress' interest in promoting diversity appears in other contexts as well, including Section 257 of the 1996 Act and the Compeitive Bidding provisions adopted the year after. 47 U.S.C. § 257(b) (directing the Commission "to promote the policies and purposes of this Act favoring diversity of media voices"); 47 U.S.C. § 309(j)(3)(B) (directing the Commission to use competitive bidding to distribute licenses among "a wide variety of applicants" including small businesses and businesses owned by women and minorities.)

Moreover, as explained above, the overriding mandate of the Communications Act directs the Commission to regulate in the public interest. For over 70 years, the phrase "public interest" in the Communications Act has included an emphasis on diversity. The phrase first appeared in the Radio Communications Act of 1927. *See* Radio Act of 1927, 44 Stat 1166. The Supreme Court immediately construed this phrase as including a concept of diversity, *Federal Radio Commission v. Nelson Bros. Bond & Mortgaging Co.*, 289 US 266, 282 (1933), a construction supported by the legislative history of the Act. *See Red Lion Broadcasting v. FCC*, 395 US 367, 376 (1969) (discussing legislative history). The Communications Act of 1934 incorporated the same phrase, and the Court similarly interpreted this phrase as embracing the diversity concept. *National Broadcasting Co. v. United States*, 319 US 190, 226 (1943). As the Supreme Court has explained, "the 'public interest' standard necessarily invites reference to First Amendment principles," and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795 (1978) (citations omitted).

II. ECONOMICS OF THE MEDIA AND SUPPORTING EMPIRICAL EVIDENCE

A. UNIQUE ECONOMICS OF MASS MEDIA AND THE IMPORTANCE OF NON-ECONOMIC FACTORS IN CIVIC DISCOURSE

1. SUMMARY

This part of the comments presents broad empirical evidence that refutes the claim that marketplace change justifies abandonment of the local newspaper/broadcast cross-ownership rules.

First, Section II examines evidence on the unique qualities of civic discourse. These are largely ignored in the Notice. It considers both economic and non-economic characteristics of the industry. It defines four types of diversity and derives public policy concerns about them from the fundamental characteristics of media markets.

In Section III we present a very different media map than the Notice has drawn. We describe the economic and functional differences between media types and demonstrate that the data provide by the Notice does not sustain its claims.

Section IV examines evidence on several kinds of "traditional" market failures that plague media markets. First we document the high degree of concentration within the distinct media markets identified in Section IV. We then review the economic problems that have been identified with allowing vertical mergers in highly concentrated industries, such as these.

Thus, we show that the Notice does not establish an evidentiary basis for changing the rules either as a result of "traditional" economic analysis or based on a more appropriate diversity analysis.

The thrust of the analysis and questions in the Notice focus on traditional economic issues like competition, concentration and integration. These are important issues and we will deal with them at great length in these comments. They are not where the analysis of civic discourse should start, however. The analysis should start with the unique economic and public policy characteristics of media markets.

The inherent structural problems and non-economic qualities of information markets, especially as they affect civic discourse, are central to public policy.[51] Economic competition alone may not achieve the goals set out for the media.[52] Indeed, the fact that media markets are prone to being highly concentrated, as described in Section V, stems from the unique fundamental economic characteristics of these markets.

The attached statement of Professor Baker and the studies of Professor Waldfogel[53] combine to define conceptually and demonstrate empirically unique sources of "market failure" in media

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[51] W.B. Ray, "FCC: The Ups and Downs of Radio-TV Regulation (Iowa: Iowa State University Press, 19900; Hopkins, Wat W., "The Supreme Court Defines the Marketplace of Ideas," *Journalism and Mass Communications Quarterly*, Spring 1996; C. M. Firestone and J. M. Schement, *Toward an Information Bill of Rights and Responsibilities* (Aspen Institute, Washington, D.C., 1995), Duncan H. Brown," The Academy's Response To The Call For A Marketplace Approach To Broadcast Regulation," 11 *Critical Studies in Mass Communications,* 257 (1994); Benkler, Free As The Air.

[52] Berry, Steven T., Joel Waldfogel, "Public Radio in the United States: Does it Correct Market Failure or Cannibalize Commercial Stations?," *Journal of Public Economics,* 1999 (71), point out free entry may not accomplish the economic goals set out for it either. There is evidence of the anticompetitive behaviors expected to be associated with reductions in competition, such as price increases and excess profits M. O. Wirth, "The Effects of Market Structure on Television News Pricing," *Journal of Broadcasting*, 1984; J. Simon, W. J. Primeaux, and E. Rice, "The Price Effects of Monopoly Ownership in Newspapers," *Antitrust Bulletin*, 1986; R. Rubinovitz (*Market Power and Price Increases for Basic Cable Service Since Deregulation*, (Economic Analysis Regulatory Group, Department of Justice, August 6, 1991); B. J. Bates, "Station Trafficking in Radio: The Impact of Deregulation," *Journal of Broadcasting and Electronic Media*, 1993.

[53] Waldfogel, Joel, *Who Benefits Whom in Local Television Markets?,* November 2001 (hereafter Television). Other papers in the series of studies of "preference externalities" were made a part of the record in conjunction with Joel Waldfogel's appearance tha the FCC Roundtable, including, *Preference Externalities: An Empirical Study of Who Benefits Whom in Differentiated Product Markets*, 2000 (hereafter Radio); with Peter Siegelman *Race and Radio: Preference Externalities, Minority Ownership and the Provision of Programming to Minorities*, 2001 (hereafter Siegelman and Waldfogel); with Felix Oberholzer-Gee, *Electoral Acceleration: The Effect of Minority Population on Minority Voter Turnout*, (2001); with Lisa George, *Who Benefit Whom in Daily Newspaper Markets?,* (2000); as well as the statement *Comments on Consolidation and Localism* (2001);); with Felix Oberholzer-Gee, *Tiebout Acceleration:* Political Participation in Heterogenous Jurisdictions , (2001) (hereafter Participation).

markets that are of extreme importance to diversity policy. These have been widely recognized in the economic literature on the media and civic discourse.[54] That literature is outlined in Baker's attachment to these comments, as well as his most recent book, *Media, Markets, and Democracy*. The purpose of this section is to explain the basic characteristics of media products and to demonstrate how specific concerns about diversity are grounded in these characteristics. The second half of this Section provides citations to specific empirical findings that document the diversity problems identified.

Two fundamental characteristics of media markets give rise to concerns about a range of market failures. High first copy/fixed costs and the inability to substitute between (strong preferences for products) give rise to a number of failures or distortions in media markets –

- a preference externality in which minorities and other small or niche groups are underserved by the media,
- the exercise of ownership influence over the organization and content of media, and
- positive externalities, like policing abuse of power or providing an avenue for participation in civic discourse, are undersupplied by the media.

These economic failures lead to three areas of diversity policy goals. Policy should promote

- institutional diversity,
- source diversity, and

[54] Baker, Democracy; Markets, identifies several schools of thought that link the structure of media markets to civic discourse policy include Sunstein, Cass, "Television and the Public Interest," *California Law Review,* 2000 (88) (hereafter Television), *Republic.Com* (Princeton: Princeton University Press, 2001). Benkler starts from similar assumptions about the nature of information and its relationship to democracy, in addition to Free As Air, see "Intellectual Property and the Organization of Information Production," forthcoming in *International Journal of Law and Economics*, "Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain," *Conference on the Public Domain"* Duke University Law School, (November 9-11, 2001), "Siren Songs and Amish Children: Autonomy, Information, and Law," *New York University Law Review*," 76 (April 2001); "Property Commons, and the First Amendment: Towards a Core Common Infrastructure," *Brennan Center for Justice, New York University Law School*, March 2000 (hereafter Core Common Infrastructure); "From Consumers to Users: Shifting the Deeper Structure of Regulation Toward Sustainable Commons and User Access," *Federal Communications Law Journal*, 56 (2000)

- viewpoint diversity.

Successful pursuit of policy in these three areas will create media markets that provide an opportunity for speakers to have access to deliver messages and listeners to hear messages from independent sources, available in an array of independently controlled media. As a result, listeners will be exposed to a wider range of news, information and points of view about culturally relevant topics.

2. UNIQUE ECONOMIC CONDITIONS

a. Key Supply And Demand Factors

Baker and Waldfogel identify two key characteristics of media markets – one on the supply side, one on the demand side. They combine to limit competition in media markets and call into question the notion that media owners are constrained by traditional pro-competitive market forces in their choices to simply do what the market requires to be economically viable.

The conceptual underpinnings of the argument are well-known to media market analysts.[55] On the supply-side, media markets exhibit high first copy costs (Baker's term) or high fixed costs (Waldfogel's term).[56] On the demand-side, media market products are in some important respects nonsubstitutable (Baker's term) or exhibit strong group-specific preferences (Waldfogel's view).[57] High first copy costs are one very important example of high fixed costs. Strong group-specific preferences are one very important example of nonsubstitutability of media products.

[55] Baker, Democracy, p. 42
[56] Waldfogel, Television, p. 1.
[57] Baker, Democracy, p. 43.

Baker and others have identified another important demand-side imperfection in media markets – the presence of advertising.[58] Advertising as a determinant of demand introduces a substantial disconnection between what consumers want and what the market produces. First, to a significant extent, because advertisers account for such a large share of the revenue of the mass media, the market produces what advertisers want as much as, if not more than, what consumers want. Second, because advertising in particular, and the media in general, are about influencing people's choices, there is a sense in which the industry creates it own demand. The tendency to avoid controversy and seek a lowest common denominator is augmented by the presence of advertisers, expressing their preferences, in the market.[59]

b. An Economic Theory of Discrimination

To elaborate, let us review Waldfogel's argument and empirical approach. Some groups express strong preferences for specific types of programming or content. Programming that is targeted at whites is not highly substitutable for programming that is targeted at blacks, from the point of view of blacks. Baker argues that media types (newspapers vs. TV, for example) are also not substitutable.

If fixed costs and groups preferences are strong, producers must decide at whom to target their content. Given the profit maximizing incentive to recover the high costs from the larger audience, they target the majority and the minority is less well served. Waldfogel's analysis describes the underlying economics in detail where there are strong differences in preferences between majority and minority populations. This might be termed an economic theory of discrimination "because it gives a non-discriminatory reason why markets will deliver fewer

[58] Waldfogel, Television, p. 1.

products – and, one might infer, lower utility – to 'preference minorities,' small groups of individuals with atypical preferences."[60] Discrimination results not from biases or psychological factors, but from impersonal economic processes.

> A consumer with atypical tastes will face less product variety than one with common tastes…. The market delivers fewer products – and less associated satisfaction – to these groups simply because they are small. This phenomenon can arise even if radio firms are rational and entirely non-discriminatory.
>
> The fundamental conditions needed to produce compartmentalized preference externalities are large fixed costs and preferences that differ sharply across groups of consumers. These conditions are likely to hold, to greater or lesser extents, in a variety of media markets – newspapers, magazines, television, and movies.[61]

This economic process of discrimination is demonstrated by Waldfogel in all three of the major media types discussed in these comments and impacted by the Notice – newspapers, radio and television programming.

c. Political Implications of Media Market "Failure"

Waldfogel identifies two critical implications of his findings that bear directly and heavily on media policy. First, he challenges the validity of a critical economic assumption about media markets. Second, he raises the most fundamental issue of civic discourse since media markets are directly related to political activity.

> Friedman has eloquently argued that markets avoid the tyrannies of the majority endemic to allocation through collective choice. Mounting evidence that minority consumer welfare depends on local minority population in local media markets indicates that, for this industry at least, the difference between market and collective choice allocation is a matter of degree, not kind. It is important to understand the relationship between market demographic composition and the targeting of

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[59] Baker, Democracy, *Advertising and a Democratic Press* (1994).
[60] Waldfogel, Radio, p. 27
[61] Waldfogel, Radio, pp. 27-30.

programming content because related research documents a relationship between the presence of black-targeted media and the tendency for blacks to vote.[62]

Waldfogel and Baker identify similar welfare and allocative impacts of this process.

Waldfogel describes the impact at the microeconomic level.

> [If] another firm introduces an imperfect substitute for her favorite product, she can be made worse off. Suppose that some fellow consumers of her favorite product prefer the new product, but she does not. Suppose further that enough of her fellow customers are diverted from her favorite product to the new product so that her favorite product no longer attracts enough to cover its costs. Her favorite product is withdrawn. This negative preference externality mechanism operates like a tyranny of the majority in markets.[63]

Baker identifies a similar process at the macro level.

> I have described how monopolistic competition among media goods can result in the success of products whose competitive success causes the failure of other media products that would produce more "consumer surplus" than the goods that prevail. The introduction of the new "synergistic" products is likely to cause a slight downward shift in the demand for other media products, causing some of them to fail even though producing them costs much less than their value to potential customers, thereby being capable of producing considerable but now lost consumer surplus…Another way to see this is that sometimes the hope of synergies purportedly justifying media mergers reflects the possibility of a greater ability to engage in more effective price discrimination or a greater likelihood of creating "blockbuster" or best selling products. These hoped for synergies, however, translate into public interest worries that the synergies lead to competitively caused damage to consumer welfare by eliminating more values alternatives.[64]

Beyond the general challenge that this to the assumptions of market efficiency, this economic process points directly to concerns that have been central to public policies that seek to enhance civic discourse – political participation and localism.

[62] Waldfogel, Local Television, p. 3.
[63] Waldfogel, Radio, p. 3.
[64] Baker, p. 80.

The political impact of the economic process stems from its impact on the ability to disseminate information. The tyranny of the majority in media market is linked to the tyranny of the majority in politics because the media are the means of political communications.

> We present evidence that electoral competition leads candidates to propose policies that are supported by proportionately larger groups and that membes of these groups are more likely to turn out if they find the proposed policies more appealing. In addition, we show that candidates find it easier to direct campaign efforts at larger groups because many existing media outlets cater to this audience…
>
> Channels of communication that are used to disseminate political information rarely exist for the sole purpose of informing potential voters. The number of channels that candidates have at their disposal reflects the cost structure of printing newspapers, establishing radio stations, and founding political groups. To the extent that these activities carry fixed costs, channels that cater to small groups are less likely to exist. The welfare implications – if one views the decision to votes as the decision to "consumer" an election -- are analogous to those of differentiated markets with fixed costs.[65]

Waldfogel finds that the preference externality operates in non-prime time programming because it is subject to greater local control and therefore can be more responsive to local market conditions.

> The local data indicate, to a grater extent than the national prime time or cable data, both the distance between black and white preferences and the fact that local programming, far more than national programming, caters to those preferences.[66]

Waldfogel see indications of similar localism effects in newspaper markets as well, supporting the conclusion that "content origin matters."[67] He describes localism's effect on behavior in the preliminary findings of a study of the entry of a national newspaper into local markets as follows.

> How does national news media affect local news sources and local political participation?

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[65] Oberholzer-Gee and Waldfogel, Participation, pp. 36-37.
[66] Waldfogel, Local Television, p. 13.
[67] Waldfogel, Localism, p. 9.

Preliminary results: increased circulation of national daily affects:

- Local paper circulation – reduced targeted audience readership
- Local paper positioning – toward local content
- Local political participation – Reduces voting, less so in presidential years[68]

d. Ownership Implications of Market Failures

Baker rests his economic analysis on assumptions similar to Waldfogel and agrees on the underlying dynamic of the market orientation of producers to create the tyranny of the majority for economic reasons. He then considers its implications for various types of behaviors and market outcomes.

First, Baker is particularly interested in (concerned with) preferences of media owners of the media who are motivated by owner preferences. In Waldfogel's argument, owners maximize profit in response to consumer preferences and discrimination is the unintended consequence of a unique juxtaposition of supply and demand characteristics. Baker argues that there is something more at work. Owners have preferences too.

The weak competition that results from the first copy/nonsubstitutability characteristics allows owners to earn monopoly profits and to use monopoly rents to pursue their personal agendas. Whatever their political preferences are, they can use both the economic resources made available by their market power and the unique role of the press to pursue those preferences.

> Nevertheless, within this type of competition, products' uniqueness or monopoly status often permits considerable margin for variation while still remaining profitable. The "potential" profit of the profit maximizing strategy can be realized and taken out as profit – which is what the corporate newspaper chains are accused of doing. However, the market itself does not require the profit maximizing response as it does in models of pure competition. Rather, the potential profit can instead be spent on indulging (or "subsidizning") the owners' choices about content or price.[69]

[68] Waldfogel, Localism, p. 9.
[69] Baker, Democracry, p. 43.

Even though this is not Waldfogel's central concern, when he looks at the question of ownership he finds support for the view that ownership matters beyond "simple" economics. Waldfogel found, in his study of radio markets that "black owners enter in situations that white owners avoid."[70] He went on to consider possible explanation for this behavior and offered a hypothesis that relied on owner preferences,

> A second possibility is that black owners enter for "ideological" reasons, which means they are willing to forego some profis in order to provide a particular sort of programming. This hypothesis would rationalize the observation that black-owned and targeted stations have fewer listeners, on average, that [sic] their white-owned counterparts (in markets with both whie and black-owned, black-targeted stations). Black owners' willingness to accept smaller returns could explain why greater black ownership increases black-targeted programming: additional black owners are willing to enter low-profitability market niches (programming to small black audiences) that whites would not enter.[71]

Perhaps Waldfogel puts the word "ideology" in quotes to blunt its negative connotation. Baker presents the policy implications in terms that are familiar and relevant to the arena of diversity policy in civic discourse.

> Choice, not merely market forces, influences quality. Choice explains the variation both within and between ownership categories. Moreover, quality may provide some efficiencies and management qualities that sometimes increase the enterprise's potential for profits or quality. However, the incentives for executives (editors and publishers) in chain firms as well as the added pressures of public ownership are likely to be directed toward focusing on increasing profits. Possibly due to price of membership or involvement within a community that leads to dedication to or desires form status in that community, local ownership might be sociologically predicted to lead to greater commitment to and greater choice to serve values other than the bottom line.[72]

One set of behaviors that is particularly problematic for Baker involves undemocratic uses of media market power in pursuit of the private interests of owners through manipulation,

[70] Siegelman and Waldfogel, p. 23.
[71] Siegelman and Waldfogel, p. 25.

cooptation and censorious behaviors.[73] This can undermine the watchdog role of the press or distort coverage of events, when it suits their interests.

e. Institutional Distortions

Baker also explains that media products possess positive externalities. Positive externalities are benefits that flow from actions that cannot be captured by producers (they are not internalized in market transactions). Since producers cannot capture the full value, they tend to produce too little, from the societal point of view. Baker chooses an example that fit directly in the current proceeding.

> Consider the merger of two entities that supply local news within one community – possibly the newspaper and radio station hypothesized above. One item both news entities "sell" is exposes the content of investigative journalism. Not just the readers or listeners but all members of the community benefit from whatever reform or better government or improved - corporate behavior that occurs due to these stories. This journalism can create huge positive externalities. The paper's limited number of purchasers cannot be expected to pay the full value of this benefit - they have no reason to pay for the value received by non-readers. Even more (economically) troubling, a major benefit of the existence of news organizations that engage in relatively effective investigative journalism is that this journalism deters wrong doing by governmental or corporate actors -but deterred behavior produces no story for the journalism to report and hence for the media entity to sell. The paper has no opportunity to internalize these benefits of its journalism -an economic explanation for there being less of this type of journalism than a straight welfare economics analysis justifies.
>
> Now turn to the consequences of a merger. Pre-merger, both news enterprises presumably settled on some level of investigative reporting that, based on the analysis suggested here, may have been profit maximizing but would have been less than socially efficient. Presumably the merged entity would still have an incentive to engage in at least a profit-maximizing amount of investigative journalism. But how much is that? The amount spent in the pre-merger situation may have reflected merely an amount that the media entity's audience wanted and would pay for (either directly or indirectly through being "sold" to advertisers). Alternatively, the pre-merger profit maximizing level for each independent entity may have reflected a

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[72] Baker, Democracy, p. 47.
[73] Baker, Democracy, pp. 73.

> competitive need to compare adequately to product offered by its competitor. In this second scenario, competition may have induced increased but still inefficiently small expenditures on investigative journalism.
>
> Given the first scenario, if the provision of investigative journalism and exposes was satisfying an audience demand, there would be little necessity for the two media entities to supply different sets of exposes to the two audiences. Presumably the merged enterprise could share the results of its investigative journalism, now supplying to each entity's respective audience (customers)only the amount previously supplied by the larger of two investigative units… What is from the perspective of the merged entity a profitable "synergy" is from the perspective of the community an inefficient loss of positive externalities.[74]

Baker focuses his discussion of externalities on an area that is particularly relevant for diversity policy. This is the institutional implication of market structure. Here he is concerned both about "intentional" action and unintended consequences.

He is concerned about the impact of owner behavior driven both by profit maximization and preference on the media institutions. Owners can choose to squeeze more profit out of media operations by cutting costs, which may reduce quality. Profit maximization can lead to the selection of employees and creation of a bottom line culture that undermines journalistic values.

More importantly, he is concerned about unintended consequences. He identifies positive externalities associated with diversity and deconcentration of ownership. In other words, allowing profit maximizers to pursue the set of media institutions that serve their interests will produce a structure that has too few, too homogeneous media producers. This will result in the loss of positive externalities of several types.

First, as described above, the watchdog function will be diminished. The public at large benefits from the watchdog function beyond the value that individual media firms can capture in their market transactions (advertising revenue and viewer payments). Left unrestrained, the

[74] Baker, Democracy, p. 64.

marketplace will produce fewer watchdog activities conducted by less rigorous institutions. Abuses are less likely to be uncovered and more likely to occur because the deterrent of the threat of exposure will be diminished.

Second, the experience of civic discourse for minorities and the public at large will be diminished. It will be more difficult for opinion leaders within minority or niche communities to gain experience in the industry. It will be more difficult for the public to gain access to the media or to be exposed to a broad range or viewpoints through the media.

> Thus, I have argued elsewhere that a *complex democracy* may benefit society as a whole – that is, is something that many people should be (and are, through collective, political decisions about structures) willing to pay to have or otherwise choose if the choice is available. And a complex democracy may require media entities that not only provide particular content but that are experienced as being owned, or at least controlled, by different groups or by people who identify as and are identified by others as being members of or having allegiances to particular groups. If so, the ownership pattern called for by this democratic theory would have significant positive externalities, but an antitrust analysis would remain blind to the costs of any merger that undermines this distribution.
>
> These examples merely begin to show how a sensitive evaluation of externalities of different media distributions and different media structures could have a huge effect on *economic* views about appropriate legal policy. Still, my suggestion is that popular preferences for a wide distribution of media ownership in general – as well as more specific popular concerns about which people or entities own the media and about the structures of ownership and control – reflect often unarticulated judgments or assumptions about the types of factors described here as "externalities" as much or more than concerns about exploitation (distribution) or inefficiencies due to monopoly pricing. These popular concerns and values are real. Even economic theory has the conceptual tools to understand them – but markets simply do not provide good means to measure or respond to them. Any antitrust theory that focuses solely on market power over pricing will be too limited in its consideration of the negative features of concentration.[75]

The positive externalities that Baker identifies with respect to the watchdog and experiential functions are part of a larger category of externalities associated with information products,

[75] Baker, Democracy, pp. 67-68.

particularly civic discourse content. Information products are seen as possessing attributes of public goods to a significant degree. Sunstein makes this broader point in regard to television.

> Even if broadcasters did provide each viewer with what he or she wanted, a significant problem would remain, and from the economic point of view, this is probably the most serious of all. Information is a public good, and once one person knows something (about for example, product hazards, asthma, official misconduct, poverty, welfare reform, or abuse of power), the benefits of that knowledge will probably accrue to others.

Note that two of the central issues noted by Sunstein are positive externalities in the political arena on which Baker's analysis is centrally focused – official misconduct and abuse of power. These are but two of many externalities of information production. As the works of Benkler and others have shows,[76] the public good quality of information production goes well beyond the realm of the media and civic discourse and is especially critical to a period that is called an information age. The narrow focus here on media and civic discourse reflects the nature of this proceeding and in no way is intended to belittle the broader public goods concerns.

The central fact that all of these discussion share is that market forces provide neither adequate incentives to produce the high quality media product, nor adequate incentives to distribute sufficient amounts of diverse content necessary to meet consumer and citizen needs. Sunstein states the general proposition as follows.

> Individual choices by individual viewers are highly likely to produce too little public interest programming in light of the fact that the benefits of viewing such programming are not fully "internalized" by individual viewers. Thus, individually rational decisions may inflict costs on others at the same time that they fail to confer benefits on others. In this respect, the problem "is not that people choose unwisely

[76] See note 32 above. Lawrence Lessig's analysis of the impact of communications structures on innovation is another body of work that focuses on the nexus between choices about economic/institutional structures, public goods, and political action (see *Code and Other Laws of Cybersapce* (Nw York: Basic Books, 1999; *The Future of Ideas: The Fate of the Commons in a Connected World* (New York: Random House, 2001)).

as individuals, but that the collective consequences of their choices often turn out to be very different from what they desire or anticipate.[77]

3. DIVERSITY IN CIVIC DISCOURSE

a. Empirical Concepts of Diversity

The unique "market failures" discussed in the previous section provide the basis for public policy intervention to ensure robust civic discourse. That is, if we were only concerned about the traditional market failures described in the previous section, we might rely on antitrust policy, perhaps with a more rigorous set of structural screens and a heightened concern for vertical/conglomerate issues. The unique market failures demand much more public policy intervention to promote ownership diversity, viewpoint diversity and institutional diversity.

As described in Part I above, the FCC's use of the terms source, viewpoint and outlet diversity glosses over the fact that ownership diversity must accompany outlet and source diversity for the latter two to have any meaning for First Amendment purposes. Here we present the concept of institutional diversity. Institutional diversity reflects the special expertise and culture of certain media, such as the newspaper tradition of in-depth investigative journalism. To promote institutional diversity, like other forms of diversity, the institutions must be independently owned.

The importance of ownership diversity does not minimize the importance of outlet and source diversity.[78] Outlet diversity, as the FCC defines it, is critical to civic discourse for two reasons. Positive externalities flow from having a larger number of outlets. To the extent that media outlets are smaller and more local, they should be more accessible. Outlet diversity also should be

[77] Sunstein, Television, p. 517, citing Frank, Robert H. and Phillip J. Cook, *The Winner Take All Society* (1999), p. 191, as well as Bourdieu, Pierre, *On Television* (The New Press, 1998), and Baker, C. Edwin, "Giving the Audience What it Wants," *Ohio State Law Journal* (1997 (58).

promoted because of the ownership influence over structure of media organizations and content.[79] These preference externalities combined with media market concentration produce systematic under-service of minorities and owners' ability to express their preferences.[80] The number of independent owners is one critical measure of source diversity, but not the only measure.

Concerns about viewpoint diversity have their origin in the ability of various sources, as the FCC defines it, to reach the public. This applies equally to localism and local points of view. Institutional diversity is grounded in both the watchdog and experience externalities.[81] The quality of investigative reporting and the accessibility of different types of institutions to leaders and the public are promoted by institutional diversity. Institutional diversity is often reflected in ownership

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[78] It is important to note that whether sources are corporations or individuals, they must also be independent in order to serve First Amendment goals.

[79] Baker, Democracy, p. 85.

> To perform these, different societal subgroups need their own media. Admittedly, these subgroups (or their members) may not *necessarily* need to own or control their own independent media. Avenues of regular and effective media access might suffice. Still, much greater confidence that the media will serve the democratic needs of these groups would be justified if ownership or control was so distributed.

[80] Baker, Democracy, p. 75, describes the loss of valuable content as the result of merger as follows:

> The idea is, for example, that the merged entertainment company can benefit by presenting the same highly promoted fictional character in new mediums – in a theatre released movie, a television show, a book, a magazine excerpt, a musical CD based on the movie sound track, and especially in the case of children oriented media, as material representations or as characters in computer games. By clever placements, the enterprise can cross promote its various products – the broadcast news division or the magazine can do stories about the release of the enterprise's outstanding new movie or television show, or do in depth reports about the program's star characters, or about the Oscar or Academy award competitions, or other related matters of "great public concern." Or the combined local broadcast station and newspaper can share reporters, thereby reducing the outlays necessary to report on local affairs, or can at least require its reporting staffs to cooperate, thereby reducing the cost of each entity doing the reporting from scratch.
>
> Profitable, however, does not mean in the public interest. Often these "synergies" or efficiency "gains" occur by creating market-dominating media goods that, although profitable for the firm, may provide less value to the public than would the media goods they drive out of existence. In other cases, these synergies result from eliminating alternative pre-merger productive activities that provided significant positive externalities.

[81] Baker, Democracy, p. 87.

> This plurality of media structures may provide security in that neither corruption that comes from government nor corruption that comes from the market is likely to be equally powerful within or equally damaging to all the organizational forms. For this reason, such a plurality of organizational structures will likely advance the media's checking function. Moreover, this diversity of media structures is likely to enable the media to better perform its multiple democratic assignments.

and viewpoint diversity; institutional diversity involves different structures of media presentation (different business models, journalistic culture and tradition) and these institutions often involve different independent owner and viewpoints across media.

We do not see exposure diversity as a measure of diversity policy. Public policy cannot, nor should it try to make people listen and learn. What it should do, through structural policy, is improve the chance that they will listen and learn. Structural policy can make it easier for people to hear civic discourse because it is spoken by louder voices. It can ensure a level playing field so that resources are available to make civic discourse attractive. It can prevent the narrowing of focus through institutional diversity so that important issues that might attract attention in one form of media are not excluded through merger. It can help to ensure that people who want to speak with different voices have access to the most commonly used media. It can force the mingling of ideas so that accidental exposure is more likely. Under the First Amendment, we can never tell people what to say, and we certainly cannot make them listen, but under the Communications Act and to serve our constitutional principles we can organize the structural rules of the industry to increase the probabilities that more people will engage in civic discourse.

b. Variety v. Diversity

As previously discussed, variety does not constitute diversity from a legal stand point. The empirical evidence also indicates that gains in variety do not compensate for losses in diversity. The media's tendency to underserve minority and atypical groups and the ownership influence over institutional configurations and content demonstrate why the claim that concentration in media market enhances diversity is wrong, or at best irrelevant.

As discussed in the Notice,[82] the claim is that when one firm buys another, it may be able to provide a little more variety by covering a new "beat" or offering a hybrid format.[83] This slight increase in variety comes at the expense of the loss of a great deal of ownership or diversity. Everyone in the market loses an independent voice, while a small segment of the market gains better coverage. In fact, depending on the distribution of preferences, the least well-served in the market may become even less well-served, if the merged entity drives out sources that are targeted to the needs of minorities and atypical groups.

Therefore, we believe that the Commission should focus on source, outlet and institutional diversity in its review of the Newspaper/Broadcast cross-ownership rules.

B. BROAD EMPIRICAL SUPPORT FOR SOURCE AND VIEWPOINT DIVERSITY POLICY CONCERNS

The previous section uses a set of recent rigorous empirical studies to demonstrate general propositions and observations about the "failure" of media markets and the resulting need for policies to promote and protect civic discourse. There is a much broader body of work that supports these observations.

[82] p. 9.

[83] Berry, Steven and Joel Waldfogel, *Mergers, Station Entry, and Programming Variety in Radio Broadcasting* (1999); George, Lisa, *What's Fit to Print: The Effect of Ownership Concentration on Product Variety in Daily Newspaper Markets* (2001). The Stevens amd Waldfogel's analysis shows that radio market suffered a much larger loss of owners than they gained in formats and the gain in formats were hybrids (close to existing formats). There was no increase in listening. Similarly, the loss of owners exceeds the gain in variety in the newspaper markets with a very small increase in circulation. The variety gains in the newspaper study appear to have been limited to the largest, least concentrated markets.

1. TRADITIONAL CONCERNS

The economic interests of media owners continues to influence their advertising, programming choices[84] and how they provide access to political information[85] as it always has, only on a grander scale.

Empirical evidence clearly suggests that concentration – fewer independent owners -- in media markets has a negative effect on diversity.[86] Greater concentration results in less diversity, while diversity of ownership across geographic, ethnic and gender lines is associated with diversity of programming. [87]

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[84] Bazelon, pp. 230-231.

[85] W. L. Bennet, *News, The Politics of Illusion* (New York: Longmans, 1988); J. C. Busterna, "Television Ownership Effects on Programming and Idea Diversity: Baseline Data," *Journal of Media Economics*, 1988; E. S. Edwards and N. Chomsky, *Manufacturing Consent* (New York: Pantheon, 1988); J. Katz, "Memo to Local News Directors," *Columbia Journalism Review*, 1990; J. McManus, "Local News: Not a Pretty Picture," *Columbia Journalism Review*, 1990; J. McManus, "How Objective is Local Television News?", *Mass Communications Review,* 1991; Price, Monroe, E., "Public Broadcasting and the Crisis of Corporate Governance," *Cardozo Arts & Entertainment*, 17, 1999.

[86] H. J. Levin, "Program Duplication, Diversity, and Effective Viewer Choices: Some Empirical Findings," *American Economic Review*, 1971; S. Lacy, "A Model of Demand for News: Impact of Competition on Newspaper Content," *Journalism Quarterly*, 1989. T. J. Johnson and W. Wanta, "Newspaper Circulation and Message Diversity in an Urban Market," *Mass Communications Review*, 1993; W. R. Davie and J.S. Lee, "Television News Technology: Do More Sources Mean Less Diversity," *Journal of Broadcasting and Electronic Media*, 1993, p. 455; W. Wanta and T. J. Johnson, "Content Changes in the St. Louis Post-dispatch During Different Market Situations," *Journal of Media Economics*, 1994; D. C. Coulson, "Impact of Ownership on Newspaper Quality," Journalism Quarterly, 1994; D. C. Coulson and Anne Hansen, "The Louisville Courier-Journal's News Content After Purchase by Gannet," *Journalism and Mass Communications Quarterly*, 1995; Iosifides, Petros, "Diversity versus Concentration in the Deregulated Mass Media," *Journalism and Mass Communications Quarterly,* Spring 1999.

[87] M. Fife, The Impact of Minority Ownership on Broadcast Program Content: A Case Study of WGPR-TV's Local News Content (Washington, D. C., National Association of Broadcasters), 1979); M. Fife, The Impact of Minority Ownership on Broadcast Program Content: A Multi-Market Study (Washington, D. C., National Association of Broadcasters), 1986); Congressional Research Service, Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus? (Washington, D.C., Library of Congress), 1988; T. A. Hart, Jr., "The Case for Minority Broadcast Ownership," Gannet Center Journal, 1988; K. A. Wimmer, "Deregulation and the Future of Pluralism in the Mass Media: The Prospects for Positive Policy Reform," Mass Communications Review, 1988; T. G., Gauger, "The Constitutionality of the FCC's Use of Race and Sex in Granting Broadcast Licenses," Northwestern Law Review, 1989; H. Klieman, "Content Diversity and the FCC's Minority and Gender Licensing Policies," Journal of Broadcasting and Electronic Media, 1991; L. A. Collins-Jarvis, "Gender Representation in an Electronic City Hall: Female Adoption of Santa Monica's PEN System," Journal of Broadcasting and Electronic Media, 1993; Lacy, Stephen, Mary Alice Shaver, and Charles St. Cyr, "The Effects of Public Ownership and Newspaper Competition on the Financial Performance of Newspaper Corporation: A Replication and Extension," *Journalism and Mass Communications Quarterly,* Summer 1996.

Minority or market segments are less well served.[88] Policies that promote ownership and participation of underrepresented points of view are a counterbalance to this tendency. To put the matter simply, minority owners are more likely to present minority points of view[89] and females are more likely to present a female point of view,[90] in the speakers, formats and content they put forward.

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[88] Waldfogel, Radio, p. 20.

> Radio programming preferences differ sharply between black and whites between Hispanics and non-Hispanics, and (to a lesser extent) across age groups. Additional consumers bring forth additional products, but in this market the products brought forth are valuable almost exclusively to members of their own groups. This is an interesting finding, among other reasons, because it gives a non-discriminatory reason why markets will deliver fewer products – and one might infer, lower utility – to "preference minorities," small groups of individuals with atypical preferences.
>
> Is this an important effect in the economy, or a curious feature of radio markets?… The fundamental conditions needed to product compartmentalized preference externalities are large fixed costs and preferences that differ sharply across groups of consumers. These conditions are likely to hold, to greater or lesser extents, in a variety of media markets – newspapers, magazines, television, and movies

[89] Empirical studies demonstrating the link between minority presence in the media and minority-oriented programming include the following M. Fife, *The Impact of Minority Ownership on Broadcast Program Content: A Case Study of WGPR-TV's Local News Content* (Washington, D. C., National Association of Broadcasters), 1979); M. Fife, *The Impact of Minority Ownership on Broadcast Program Content: A Multi-Market Study* (Washington, D. C., National Association of Broadcasters), 1986); Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* (Washington, D.C., Library of Congress), 1988; T. A. Hart, Jr., "The Case for Minority Broadcast Ownership," Gannet Center Journal, 1988; K. A. Wimmer, "Deregulation and the Future of Pluralism in the Mass Media: The Prospects for Positive Policy Reform," *Mass Communications Review*, 1988; Evans, Akousa Barthewell, "Are Minority Preferences Necessary? Another Look at the Radio Broadcasting Industry," *Yale Law and Policy Review*, 1990 (8); Dubin, Jeff and Matthew L. Spitzer, "Testing Minority Preferences in Broadcasting," *Southern California Law Review,* 1995 (68); Bachen, Christine, Allen Hammond and Laurie Mason, and Stephanie Craft, *Diversity of Programming in the Broadcast Spectrum: Is there a Link Between Owner Race or Ethnicity and News and Public Affairs Programming?,* Santa Clara University, December 1999); Mason, Laurie, Christine M. Bachen, Stephanie L. Craft, "Support for FCC Minority Ownership Policy: How Broadcast Station Owner Race or Ethnicity Affects News and Public Affairs Programming Diversity," *Comm. L. Pol'Y,* 2001 (6).

[90] A similar line of empirical research dealing with gender exists, see Lacy, Stephen, Mary Alice Shaver, and Charles St. Cyr, "The Effects of Public Ownership and Newspaper Competition on the Financial Performance of Newspaper Corporation: A Replication and Extension," *Journalism and Mass Communications Quarterly,* Summer 1996; T. G., Gauger, "The Constitutionality of the FCC's Use of Race and Sex in Granting Broadcast Licenses," Northwestern Law Review, 1989; H. Klieman, "Content Diversity and the FCC's Minority and Gender Licensing Policies," *Journal of Broadcasting and Electronic Media*, 1991; L. A. Collins-Jarvis, "Gender Representation in an Electronic City Hall: Female Adoption of Santa Monica's PEN System," *Journal of Broadcasting and Electronic Media,* 1993; Lauzen, Martha M. and David Dozier, "Making a Difference in Prime Time: Women on Screen and Behind the Scenes in 1995-1996 Television season, *Journal of Broadcasting and Electronic Media*, 1999 (winter.); O'Sullivan, Patrick B., "The Nexus Between Broadcast Licensing Gender Preferences and Programming Diversity: What Does the Social Scientific Evidence Say?" *Department of Communication, Santa Barbara, CA.* (2000).

The dictates of mass audiences create a largest market share/lowest common denominator ethic that undercuts that ability to deliver diverse, locally-oriented,[91] and public interest programming.[92] Simply put, the existence of multiple outlets providing more examples of similar shows does not accomplish the goal of providing greater diversity of points of view.[93]

There is clear evidence that greater concentration will reduce public interest and culturally diverse programming[94] as well as locally-oriented programming. [95] News and public affairs

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[91] Slattrey, Karen L. Ernest A. Hakanen and Mark Doremus, "The Expression of Localism: Local TV news Coverage in the New Video Marketplace," *Journal of Broadcasting & electronic Media*, 40, 1996; Carroll, Raymond L. and C.A. Tuggle, "The World Outside: Local TV News Treatment of Imported News," *Journalism and Mass Communications Quarterly*, Spring 1997; Fairchild, Charles, "Deterritorializing Radio: Deregulation and the Continuing Triumph of the Corporatist Perspective in the USA," *Media, Culture & Society,* 1999 (21).

[92] Bagdikian, Ben, *The Media Monopoly* (Boston, Beacon Press, 2000), pp. 182... 188; p. Clarke and E. Fredin, "Newspapers, Television, and Political Reasoning," Public Opinion Quarterly, 1978; M. Pfau, "A Channel Approach to Television Influence," Journal of Broadcasting and Electronic Media, 1990; D. T. Cundy, "Political Commercials and Candidate Image," in New Perspectives in Political Advertising (L. L Kai, et. al, Eds.); G. J. O'Keefe, "Political Malaise and Reliance on the Media," Journalism Quarterly, 1980; S. Becker and H. C. Choi, "Media Use, Issue/Image Discrimination," Communications Research, 1987; J. P. Robinson and D. K. Davis, "Television News and the Informed Public: An Information Process Approach," Journal of Communication, 1990; Voakes, Paul S. Jack Kapfer, David Kurpius and David Shano-yeon Chern, "Diversity in the News: A Conceptual and Methodological Framework," *Journalism and Mass Communications Quarterly*, Autumn, 1996.

[93] Evidence that increasing variety does not increase diversity can be found in see A. S. Dejong and B. J. Bates, "Channel Diversity in Cable Television," Journal of Broadcasting and Electronic Media, 1991; A. E. Grant, "The Promise Fulfilled? An Empirical Analysis of Program Diversity on Television," The Journal of Media Economics, 1994; Hellman, Heikki and Martii Soramaki, "Competition and Content in the U.S. Video Market," *Journal of Media Economics*, 1994 (7); Lin, C.A., "Diversity of Network Prime-Time Program Formats During the 1980s," *Journal of Media Economics*, 1995 (8); Kubey, Robert, Mark Shifflet, Niranjala Weerakkody, and Stephen Ukeiley, "Demographic Diversity on Cable: Have the New Cable Channels Made a Difference in the Representation of Gender, Race, and Age?", *Journal of Broadcasting and Electronic Media*, 1995 (39)) as well as other nations (see Deakin, Simon, Stephen Pratten, "Reinventing the Market? Competition and Regulatory Change in Broadcasting," *Journal of Law and Society,* 1999 (26); Li, Hairong, Janice L. Bukovac, "Cognitive Impact of Banner Ad Characteristics: an Experimental Study," *Journalism & Mass Communication Quarterly,* 1999 (76); Kilborn, Richard W., "Shaping the Real," *European Journal of Communication,* 1998 (13); Blumer, Jay G. and Carolyn Martin Spicer, "Prospects for Creativity in the New Television Marketplace: Evidence form Program-Makers," *Journal of Communications*, 1990 (40), p. 78

[94] V. A. Stone, "Deregulation Felt Mainly in Large-Market Radio and Independent TV," Communicator, April, 1987, p. 12; P. Aufderheide, "After the Fairness doctrine: Controversial Broadcast Programming and the Public Interest," Journal of communication (1990), pp. 50-51; M. L. McKean and V. A. Stone, "Why Stations Don't Do News," Communicator, 1991, pp. 23-24; V. A. Stone, "New Staffs Change Little in Radio, Take Cuts in Major Markets TV, RNDA, 1988; K. L. Slattery and E. A. Kakanen, "Sensationalism Versus Public Affairs Content of Local TV News: Pennsylvania Revisited," Journal of Broadcasting and Electronic Media, 1994; J. M. Bernstein and S. Lacy, "Contextual Coverage of Government by Local Television News," Journalism Quarterly, 1992; R. L. Carrol, "Market Size and TV News Values," Journalism Quarterly, 1989; D. K. Scott and R. H. Gopbetz, "Hard News/Soft News Content of the National Broadcast Networks: 1972-1987," Journalism Quarterly, 1992; Washburn, op. cit, p. 75; Ferrall, pp. 21... 28... 30.

programming is particularly vulnerable to these economic pressures.[96] As market forces grow, this programming is reduced.[97] The quality of the programming is also compromised.[98]

Commercialization can easily overwhelm public interest and diverse content.[99] The radio industry, which has been subject to the most unfettered process of rationalization demonstrates how local content can be homogenized off the air.[100] The growing impact of homogenization in the TV

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[95] Kathryn Olson, "Exploiting the Tension between the New Media's "Objective" and Adversarial Roles: The Role Imbalance Attach and its Use of the Implied Audience, Communications Quarterly 42: 1, 1994 (pp. 40-41); A. G. Stavitsky, "The Changing Conception of Localism in U.S. Public Radio," Journal of Broadcasting and Electronic Media, 1994.

[96] J. H. McManus, "What Kind of a Commodity is News?", Communications Research, 1992; Olson, op. cit.

[97] Bagdakian, pp. 220-221; D. L. Paletz and R. M. Entmen, Media, Power, Politics, (New York, Free Press, 1981). N. Postman, Amusing Ourselves to Death: Public Discourse in the Age of Show Business (New York Penguin Press, 1985); S. Lacy, "The Financial Commitment Approaches to News Media Competition," Journal of Media Economics, 1992.

[98] B. R. Litman, "The Television Networks, Competition and Program Diversity," Journal of Broadcasting, 1979; B. R. Litman and J. Bridges, "An Economic Analysis of Daily Newspaper Performance," Newspaper Research Journal, 1986; J. C. Buterna, "Television Station Ownership Effects on Programming and Idea Diversity: Baseline Data," Journal of Media Economics, 1988; J. Kwitny, "The High Cost of High Profits," Washington Journalism Review, 1990; A. Powers, "Competition, Conduct, and Ratings in Local Television News: Applying the Industrial Organization Model," Journal of Media Economics, 1993.

[99] Rifkin, *The Age of Access,* pp. 7-9.

> More and more cutting edge-commerce in the future will involve the marketing of a vast array of cultural experiences rather than of traditional industrial-based goods and services…
>
> While the industrial era was characterized by the commodification of work, the Age of Access is about, above all else, the commodification of play – namely the marketing of cultural resources including rituals, the arts, festivals, social movements, spiritual and fraternal activities, and civic engagement in the form of paid-for personal entertainment…
>
> Imagine a world where virtually every activity outside the confines of family relations is a paid-for experience, a world in which traditional obligations and expectations – mediated by feelings of faith, empathy, and solidarity – are replaced by contractual relations in the form of paid memberships, subscriptions, admission charges, retainers and fees

[100] Fairchild, pp. 557-559,

> News programming, especially local news, which has always been the most expensive kind of programming to produce, has been rationalized almost out of existence, with a significant amount of centralization and heavy reliance on national wire services and increased use of 'information management' services of public relations companies…
>
> In Washington DC, for example, consolidation has led to one news production team providing identical new to 10 stations form a central location, personalizing each station's news break with their call letters… Staff can choose which pieces of news they will include in their own newscasts, but have no control over news content and given the economic realities created and fostered by deregulation, few may actually have the means to make these choices…
>
> It is a fairly straightforward concept: a computer system allows the station to download programming minutes or even days in advance… All possible functions of a radio station, defined in advance, are covered by one of 99 preset computer command. 'Any station joining the network 'can expect to cut operating costs by 30 to 50 percent.' The advantage of the network,' writes one business reporter, 'is that the station need not worry about selecting the music, the programming staple of most stations on

industry stimulated by the lifting of national ownership limits and restrictions on vertical integration into programming is also unmistakable.[101] Insertion of local programming is restricted or eliminated. Stories of local importance are driven out of the high visibility hours or off the air. Pooled news services reduce the ability of local stations to present local stories and eventually erode the capability of producing them.

2. NEW MEDIA, SIMILAR CONCERNS

The extremely powerful commercial thrust of the new media does not negate, rather it reinforces the central concern of media public policy.[102] New technologies do not alter underlying economic relationships because the mass-market audience orientation of the business takes precedence and there is no reason to assume that the emergence of a different medium, like the Internet, will change behaviors of dominant firms.[103] Indeed, because the new media markets have

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the network. 'Pelmorax uses programming consultant to tailor the music and Decima Research to ensure that its formats reach the right demographics.

[101] Network Affiliated Stations Alliance, "Petition for Inquiry into Network Practices." (Federal Communications Commission, Mar. 8, 2001).

[102] Firestone and Schement, p. 45; Stempell, Guido H. III, and Thomas Hargrove, "Mass Media Audiences in a Changing Media Environment," *Journalism and Mass Communications Quarterly*, Autumn 1996; Gunther, Albert C. "The Persuasive Press Inference: Effects of Mass Media on Perceived Public Opinion," *Communications Research*, October 1998; American Civil Liberties Union v. Janet Reno, 929 F. Supp. 824 (E.D. Pa. 1996), 117 S.Ct. 2329 (1997); Iosifides, Petros, "Diversity versus Concentration in the Deregulated Mass Media Domain," *Journalism & Mass Communication Quarterly,* 1999 (76).

[103] K. C. Loudon, "Promise versus Performances of Cable," in W.H. Dutton, et al., Wired Cities: Shaping the Future of Communications (Boston, K.G. Hall, 1987). D. Le Duc, Beyond Broadcasting ((New York: Longman, 1987); T. Streeter, "The Cable Fable Revisited; Discourse, Policy, and the Making of Cable Television," Critical Studies in Mass Communications, 1987; B. Winston, "Rejecting the Jehovah's Witness Gambit," Intermedia, 1990; N. M. Sine, et al., "Current Issues in Cable Television: A Re-balancing to Protect the Consumer," Cardozo Arts & Entertainment Law Journal, 1990; V. E. Ferrall, "The Impact of Television Deregulation," Journal of Communications, 1992; R. H. Wicks and M. Kern, "Factors Influencing Decisions by Local Television News Directors to Develop New Reporting Strategies During the 1992 Political Campaign," Communications Research, 1995; Motta Massimo and Michele Polo, "Concentration and Public Policies in the Broadcasting Industry," Lubunski, Richard, "The First Amendment at the Crossroads: Free Expression and New Media Technology," *Communications Law and Policy,* Spring 1997; Chan-Olmsted, Sylvia M., Jung Suk Park, "From On-Air to Online World: Examining the Content and Structures of Broadcast TV Stations' Web Sites," *Journalism & Mass Communication Quarterly,* 2000 (77).

moved quickly to vertical integration by dominant incumbents form the old media, the problems of raising capital and acquiring licenses that have afflicted the old media persist.[104]

Companies introducing technologies can identify the likely early adopters and innovators and orient their product distribution to maximize the penetration within that market segment. [105] There is a very strong base of support for the importance of income and education in the adoptions of high technology innovations like computers and telecommunications equipment.[106] The strong predictors of inclination to early adoption point directly to market segmentation strategies.[107] In other words, companies introducing technologies can identify the likely adopters and orient their product distribution to maximize the penetration within that market segment. The competitive energies of the industry are focused on the "premier" segment, with innovative offerings and consumer-friendly pricing, while the remainder of the population is ignored or suffers price increases.

Future commercialization will enhance current exclusion of certain groups. The drive to sell more subscriptions and reach a broader, yet highly targeted audience advertising that caters to their

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[104] Civil Rights Forum on Communications Policy, When Being No. 1 is Not Enough: The Impact of Advertising Practices on Minority-Owned and Minority Formatted Broadcast Stations (1999), asserts a bias in advertising rates. Bradford, William D., "Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes," School of Business Administration (Univ. of Washington), December 5, 2000, asserts a bias in capital markets.

[105] Sakar, Jayati, "Technological Diffusion: Alternative Theories and Historical Evidence," *Journal of Economic Surveys*, 12:2, 1998; Martinez, Evan, Yolanda Polo and Carlos Flavian, "The Acceptance and Diffusion of New Consumer Durables: Differences Between First and Last Adopters," *Journal of Consumer Marketing*, 15:4, 19998.

[106] Meeks, Carol B., Anne L. Sweaney, "Consumer's Willingness to Innovate: Ownership of Microwaves, Computers and Entertainment Products," *Journal of Consumer Studies and Home Economics*, 16, 1992; Savage, Scott Gary Madden and Michael Simpson, "Broadband Delivery of Educational Services: A Study of Subscription Intentions in Australian Provincial Centers," *Journal of Media Economics*, 10:1, 1997; Atkin, David J., Leo W. Jeffres and Kimberly A. Neuendorf, "Understanding Internet Adoption as Telecommunications Behavior," *Journal of Broadcasting and Electronic Media*, 42:4, 1998; Neuendorf, Kimbelry A., David Atkin and Leo W. Jeffres, "Understanding Adopters of Audio Information Innovations," *Journal of Broadcasting and Electronic Media*, 42:4, 1998; Lin, Carolyn, A., "Exploring Personal Computer Adoption Dynamics," *Journal of Broadcasting and Electronic Media*, 42:4, 1998.

[107] Sultan, Fareena, "Consumer Preferences for Forthcoming Innovations: The Case of High Definition Television," *Journal of Consumer Marketing*, 16: 1999, p. 37.

individual tastes will be intense, resulting in a commercialization on a grander scale.[108] The resulting e-commerce will be an electronic "direct mail on steroids" pumped up by the ability of viewers to click through digitally inserted advertising for purchases.[109] The high powered advertising will be targeted at demographically compatible viewers identified by detailed information created by the two-way network on viewing patterns and past purchases, [110] leading to growing concerns that certain groups are not likely to have fair access to the opportunities of cyberspace.[111] The new services may be expensive to deliver because of the cost of appliances, production equipment necessary to produce programming that takes advantage of the new appliance, and also because of the infrastructure necessary to deliver interactive services. [112] The cost of services, and the targeting of marketing points to a commercial model in which high-value, high-income consumers are the ones that marketers seek to woo.

C. THE SPECIAL IMPORTANCE OF INSTITUTIONAL DIVERSITY

In refining the concept of outlet diversity to focus on institutional differences, we reflect an empirical reality that is clear in the marketplace of ideas. Each medium plays a different role in the commercial marketplace and a different role in the marketplace of ideas.[113]

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[108] Morgan Stanley Dean Whitter Reynolds, *Digital Decade* (New York, 1999).

[109] Van Orden, Bob, "Top Five Interactive Digital-TV Applications," *Multichannel News*, June 21, 1999, p. 143, Kearney, Chapter 4.

[110] Menezes, Bill, "Replay, TiVo Get Cash for Consumer Push," *Multichannel News*, April 5, 1999, p. 48

[111] Cooper, "Inequality in Digital Society," *Cardozo Jounral On Media and the Arts,* forthcoming. .

[112]The cost of early HDTV equipment has been exorbitant and current prices in the range of $2,000-$4,000 "Profile with Bob Wright: The Agony Before the Ecstasy of Digital TV," *Digital Television*, April 1999, p. 40; Maxwell, Kim. *Residential Broadband: An Insider's Guide to the Battle for the Last Mile* (John Wile: New York: 1999); pp. 9-10.

[113] Brown, Allan, "Public Service Broadcasting in Four Countries: Overview," *The Journal of Media Economics,* 1996 (9); Moy, Patricia and Dietram A. Scheufele, "Media Effects on Political and Social Trust," *Journalism and Mass Communications Quarterly*, 2000 (77), pp. 746…751.

> The general trend of effects is one in which reliance on television news leads to lower levels of trust in government, while newspaper reading results in higher levels of trust…
> While the mass media have been blamed for diminishing levels of trust among the citizenry, we have shown that it is crucial to distinguish not only between types of media, but also between types of trust.

Television does not perform the same function as newspapers and neither replaces radio. TV has come to dominate mass media in political discourse,[114] by influencing on attitudes and behaviors,[115] especially in election campaigns. Television and radio have long been recognized as occupying different product spaces[116] although radio's role may be changing.[117] Generally, radio is seen as having less of an impact than television.[118] However, the difference between TV and radio may be in the citizens' exposure to political advertising on TV, while radio talk shows have a different impact.[119] Broadcast does not compete effectively with newspapers in the news function.

> Wasn't it television and radio that were going to kill newspapers? "I don't really consider them competition in that old-school way," stresses Florida Sun-Sentinel editor Earl Maucker. "They reach a different kind of audience with a different kind of news…

Our analysis shows that use of different types of media has different effects on political and social trust.

[114] Albarran, Alan B. and John W. Dimmick, "An Assessment of Utility and Competitive Superiority of in the Video Entertainment Industries," *Journal of Media Economics*, 1993 (6); Bennett, W. Lance, Regina G. Lawrence, "News Icons and the Mainstreaming of Social Change," *Journal of Communication,* 1995 (45); McLeod, Douglas M., "Communicating Deviance: The Effects of Television News Coverage of Social Protests," *Journal of Broadcasting & Electronic Media,* 1995 (39); Dimmick, John, B. "The Theory of the Niche and Spending on Mass Media: The Case of the Video Revolution," *Journal of Media Economics*, 1997 (10); Sparks, Glenn G., Marianne Pellechia, Chris Irvine, "Does Television News About UFOs Affect Viewers' UFO Beliefs?: An Experimental Investigation," *Communication Quarterly*, 1998 (46); Walma Van Der Molen, Juliette H., Tom H. A. Van Der Voort, "The Impact of Television, Print, and Audio on Children's Recall of the News," *Human Communication Research,* 2001 (26).

[115] Wilkins, Karin Gwinn, "The Role of Media in Public Disengagement from Political Life," *Journal of Broadcasting & Electronic Media,* 2000 (44).

[116] Clarke, Pere and Eric Fredin, "Newspapers, Television and Political Reasoning," *Public Opinion Quarterly,* 1978 (summer); Robinson, John P. and Mark R. Levy, "New Media Use and the Informed Public: A 1990s Update," *Journal of Communications,* 1996 (spring).

[117] The role of radio talk shows is the new development. Johnson, Thomas J., Mahmoud A.M. Braima, Jayanthi Sothirajah, "Doing the Traditional Media Sidestep: Comparing Effects of the Internet and Other Nontraditional Media with Traditional Media in the 1996 Presidential Campaign," *Journalism & Mass Communication Quarterly,* 1999 (76), find that nontraditional media do not have an impact on a variety of measures of knowledge and perceptions about the 1996 presidential campaign and to the extent they do, it was specifically radio talk shows, influencing views of Clinton negatively (see also Moy, Patricia, Michael Pfau, LeeAnn Kahlor, "Media Use and Public Confidence in Democratic Institutions," *Journal of Broadcasting & Electronic Media,* 1999 (43)).

[118] Berkowitz, D. and D. Pritchard, "Political Knowledge and Communication Resources," *Journalism Quarterly,* 1989 (66); Chaffee, S. H. and X. Zhao and G. Leshner, "Political Knowledge and the Campaign Media of 1992," *Communications Research,* 1994 (21); D Drew and D. Weaver, "Voter Learning in the 1988 Presidential Election: Did the Media Matter?" *Journalism Quarterly*, 1991 (68).

[119] Johnson, Braima and Sothirajah, 2000, juxtapose the earlier finding of a lack of influence for radio with more recent findings that radio talk shows have an impact. See also, Johnson, Braima and Sothirajah, 1999, and Stamm, K., M Johnson and B. Martin, "Differences Among Newspapers, Television and Radio in their Contribution to Knowledge of the Contract with America," *Journalism and Mass Communications Quarterly*, 1997 (74).

> Publisher Gremillion, a former TV executive himself, seconds the point, "I don't believe people are watching TV as a substitute for reading the newspaper…"
>
> …Many newspapers are increasingly writing off local TV news as a serious threat, treating local stations instead as potential partners who can help spread the newspapers' brand name to new and bigger audiences.[120]

As suggested, newspapers provide a different type of information service with different impact. They also provide a different news function than video or radio, with much longer and in depth treatment of issues. In this they have adapted to a role that is distinct from television.

The news business itself reflects the partitioning in its awards… Pulitzer prizes have been added for criticism, features, and explanatory writing, because those are aspects of news left for print excellence in television's wake… For while television editorializing can be intelligent and eloquent, and even promote political change, the star treatment accorded to television news personalities removes them from the civic discourse.[121]

Newspapers devote greater attention to local news and provide a distinct role through broad, deep coverage and investigative reporting.[122] One area of great significance is local news reporting.[123] Print journalists often assert an allegiance to their almost century-old creed:

> I believe in the profession of journalism. I believe that the public journal is a public trust; that all connected with it are, to the full measure of their responsibility, trustees for the public; that acceptance of lesser service than the public service is a betrayal of this trust.[124]

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[120] Stepp, Carl Sessions, *"Whatever Happened to Competition," American Journalism Review* (June 2001).

[121] Cornfield, Michael, "What is Historic About Television?", *Journal of Communications*, 1994 (21), pp. 110-111.

[122] Coulson, David C. and Stephen Lacy, "Newspapers and Joint Operating Agreements," in *Contemporary Media Issues (E. David Sloan and Emily Erickson Hoff, Eds.) (Vision Press, Northport: 1998)* Lacy, Stephen, David C. Coulson, Charles St. Cyr, "The Impact of Beat Competition on City Hall Coverage," *Journalism & Mass Communication Quarterly,* 1999 (76).

[123] The attached statement of Ben Bagdikian speaks eloquently about the difference between the two and thr threat to localism.

[124] Kunkel, Thomas and Roberts, Gene, "The Age of Corporate Newspapering; Leaving Readers Behind," *American Journalism Review* (2001) citing Walter Williams, *The Journalist's Creed* (1914).

Compare these journalistic values with the image presented by Tribune Company executives, describing how the Chicago Tribune and Chicago television station WGN, among other media properties, view their business:

> Tribune had a story to tell – and it was just the story Wall Street wanted to hear.
>
> In charts and appendices, they showed a company that owns four newspapers—and 16 TV stations (with shared ownership of two others); four radio stations; three local cable news channels; a lucrative educational book division; a producer and syndicator of TV programming, including Geraldo Rivera's daytime talk show; a partnership in the new WB television network; the Chicago Cubs; and new-media investments worth more than $600 million, including a $10 million investment in Baring Communications Equity Fund, with dozens of Asian offices hunting out media investments.
>
> …There was an internal logic and consistent language to their talk: Tribune, said the four men, was a "content company" with a powerful "brand." Among and between its divisions, there was a "synergy."
>
> …It was a well-scripted, well-rehearsed performance, thorough and thoroughly upbeat. And the word "journalism" was never uttered, once.
>
> …Even apart from TV and new media—at the Tribune papers themselves—the editor in chief rarely presides at the daily page one meeting. The editor's gaze is fixed on the future, on new zoned sections, multimedia desks, meetings with the business side, focus group research on extending the brand, or opening new beachheads in affluent suburbs. "I am not the editor of a newspaper," says Howard Tyner, 54, whose official resume identifies him as vice president and editor of the Chicago Tribune. "I am the manager of a content company. That's what I do. I don't do newspapers alone. We gather content.[125]

In highlighting the Tribune Co., we do not mean to suggest that there is anything wrong with the company's behavior. On the contrary, economic "synergies" may certainly help Tribune improve the quality of its media products. And we do not mean to suggest that other factors, like newspaper consolidation and newspaper ties with other corporate entities, do not also challenge print journalist's ability to follow their creed. However, when the two largest sources of news and

[125] Auletta, Ken, "The State of the American Newspaper." *American Journalism Review* (June 1998).

information – television and newspaper[126] – come under the same ownership roof, there is special cause for concern about business pressures that could undermine the free marketplace of ideas.

Dangers ranging from favorable newspaper reviews of a broadcaster's programming, to positive editorials/opinion articles about business interests of a broadcaster or politicians who favor such business interests would be difficult to prevent if cross-ownership is broadly permitted:

> Down in Tampa, Media General has gone so far as to put its newspaper, the Tribune, in the same building with its local television station and online operation, the better to exchange stories and, ostensibly, resources. (It's still unclear what the newspapers get out of the bargain other than garish weather maps sponsored by the local TV meteorologist.) Tampa's has become the most sophisticated model of this kind of thing, and as such is drawing enormous interest from other newspaper companies.
>
> Under the Tampa model, and presumably in most major city rooms of the future, news decisions for all these outlets are made in a coordinated way, sometimes in the same meeting. In effect the same group of minds decides what "news" is, in every conceivable way that people can get their local news. This isn't sinister; it's just not competition.[127]

Except where there is meaningful competition between local newspapers, we believe that lifting the newspaper/broadcast cross-ownership ban would significantly undercut the watchdog role that newspapers play over broadcasters and thereby undermine – particularly in the realm of political speech – Congress' goal of ensuring an open marketplace of ideas.

TV in general, and network TV in particular, has become the premier vehicle for political advertising. The differential impact of television advertising is clear.

> Clearly, television is a unique communications medium unlike any other, including print, radio, and traditional public address. Unlike most other media, television incorporates a significant nonverbal component, which not only serve to suppress the importance of content but also requires little deliberative message processing…
>
> A number of empirical studies have concluded that reliance on information from television leads to less understanding of policy issues than newspapers. Studies also

[126] Media Studies Center Survey, University of Connecticut, Jan. 18, 1999.
[127] Kunkel, Thomas and Roberts, Gene, *"The Age of Corporate Newspapering; Leaving Readers Behind." American Journalism Review* (May 2001).

> indicate that when people use television for political news, they emerge less informed than those of equal education and political interest who avoid the medium.[128]

It is difficult to imagine the Thomas Paine pamphleteer tradition of print journalism – considered so valuable to our core beliefs that the Supreme Court granted it the most far reaching First Amendment protections[129] -- will be able to survive in a world where newspapers become marketing devices for broadcasters.

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[128] Sinclair, Jon, R., "Reforming Television's Role in American Political Campaigns: Rationale for the Elimination of Paid Political Advertisements," *Communications and the Law*, March 1995.

[129] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

III. A MAP OF COMMERCIAL MEDIA MARKETS

A. SUMMARY: THE CASE FOR ABANDONING STRUCTURAL POLICY TO PROMOTE DIVERSITY HAS NOT BEEN MADE

The Notice describes changes in media markets as "dramatic"[130] and asks whether they provide the basis for abandoning or altering its ownership policy. The Notice provides a brief overview of empirical evidence, primarily a count of outlets for each of the major technologies affected by the cross-ownership ban, to support this claim.[131] It also identifies other technologies – direct broadcast satellite (DBS) and the Internet – which are said to be dramatically altering the media environment. The central premise offered is that technological changes and new competition between various means of dissemination of mass communications have created a competitive landscape in which diversity is assured by competition across media products.

The intermedia competition that the Notice hypothesizes to justify changing the rule simply does not exist, either as a matter of simple economics or as a matter of diversity in civic discourse. In particular, when we focus on the ownership of news outlets as the central mechanism driving toward the goal of diversity in civic discourse, the statistics put forth in the Notice do not come close to establishing a predicate to abandon structural policies as the vehicle assuring diversity.

This section analyses the markets in broadcast TV, newspaper, radio, multichannel video and the Internet (see Exhibit III-1). For each medium, we look at whether its

[130] Notice, p. 5.
[131] Notice, pp. 6-9.

EXHIBIT III-1a:

THE MEDIA PRODUCT SPACE

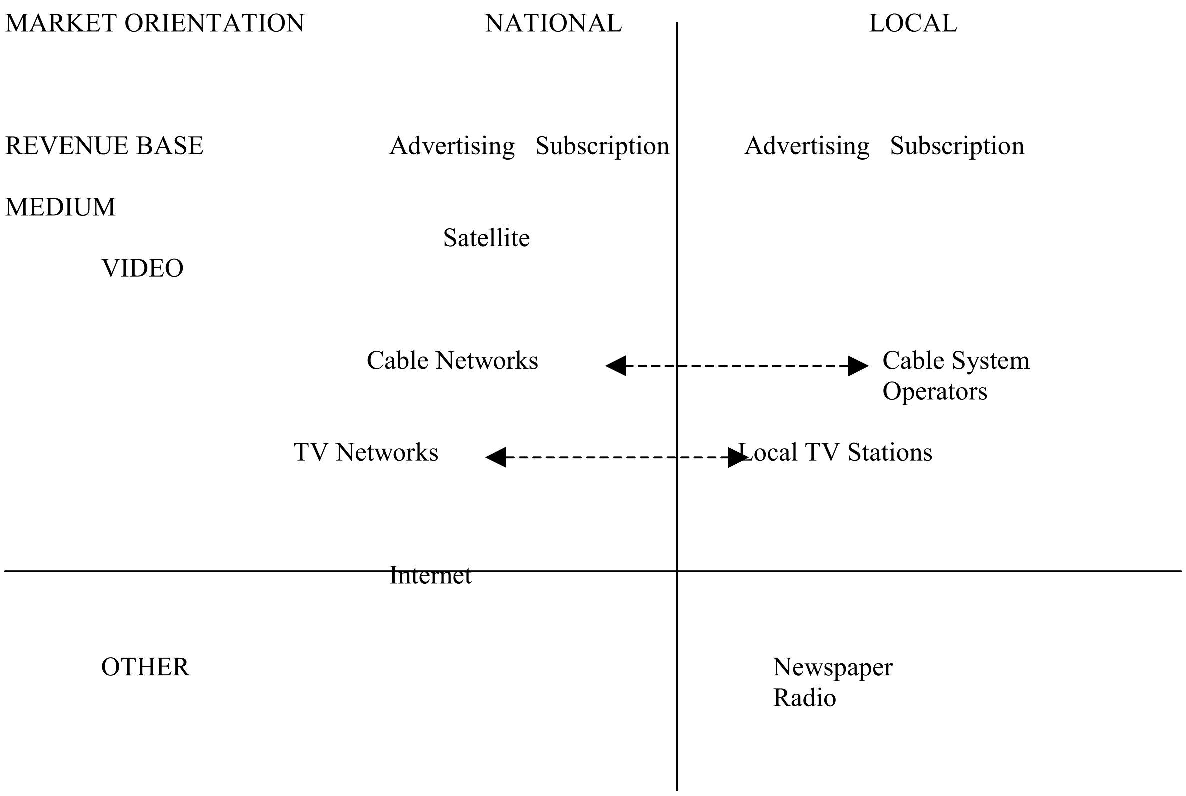
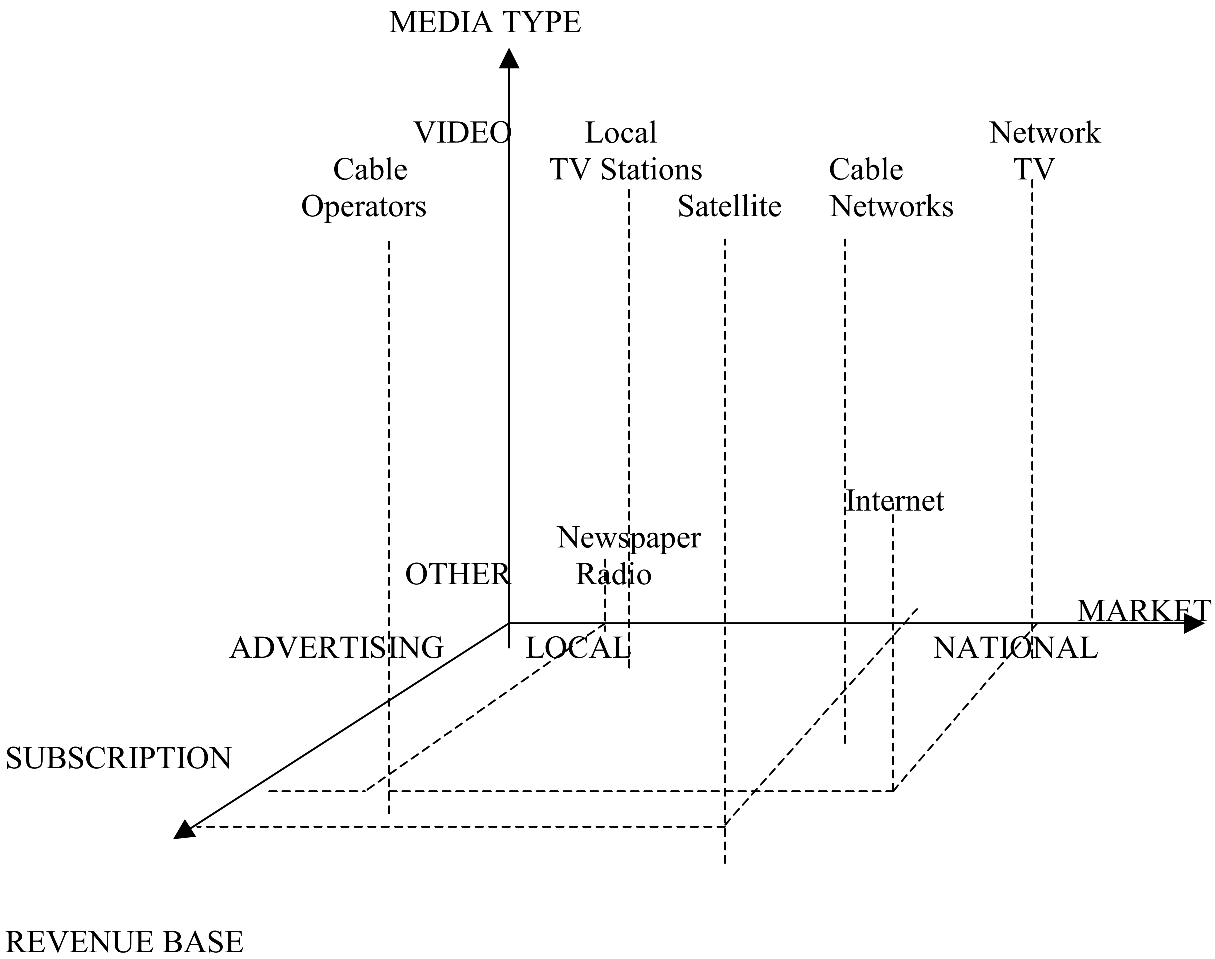


EXHIBIT III-1b:

THE MEDIA PRODUCT SPACE (THREE DIMENSIONAL)



orientation is national or local, its revenue sources, and its capacity for news production, as well as other qualitative factors. The analysis demonstrates that these media do not compete with each other, and that each such market is highly concentrated.

Broadcast TV, multichannnel TV, newspapers, radio and the Internet are separate products that are not close substitutes. They are used in different ways by the public, based on different business models and address different advertising markets. Viewing of national news and news shows have shifted somewhat from over-the-air to cable, but the programming remains dominated by a small set of network owners. Moreover, a careful market analysis reveals that there are several kinds of media markets (e.g., national vs. local, primetime television vs. daytime TV, national network news vs. all other news programming), which support different business models (e.g., subscription-based vs. advertiser-based). These markets are adjacent to each other, rather than in competition with each other. To be sure, there is some competition or rivalry across media, but newspapers' classified advertising cash cow in no way resembles the high-priced pharmaceutical and auto advertising splashed across national television network primetime programming. These are separate markets that are not yet, and may not ever be substitutes for one another.

Use of the Internet has not substantially changed the pattern of viewing of commercial mass media. The Internet functions very differently and fulfills a very different need than mass media. It accounts for a very small share of usage and advertising dollars compared to traditional commercial mass media.

We should not be surprised to find that the differences in commercial product space discussed above are also evident in the marketplace of ideas. These media play different roles in the realm of political discourse and news. It is a mistake to define all media as the same in terms of their impact or to believe that new media will displace the old. The need for diversity converges with our observation that each media type falls into a distinct commercial product space. The two dominant political media – daily newspapers and television – appear to play very different roles. TV, which is, by far, the dominant political advertising vehicle, has a special influence on political discourse, through its influence on political attitudes and behaviors, and its prominent place in election campaigns. Newspapers provide a distinct role through broad, deep coverage and investigative reporting.

Allowing media cross-ownership to obliterate the distinction between different media would frustrate promotion of robust civic discourse yet another way: It would undermine the institutional diversity in the commercial mass media. Entertainment variety that drives commercial mass media is not the same as information diversity, especially in light of the unique role of news reporting as a fourth estate checking waste, fraud and abuse of power by governments and corporations. Antagonism in the marketplace of ideas cannot be reduced to competition in the economic marketplace, without recognizing that outlets are not independent voices when they have the same owners. Profit maximization, especially in advertiser driven industries, homogenizes products. The tendency of nationally-oriented commercial mass media to eliminate locally-oriented controversial programming and local point of view programming as a cost cutting "efficiency" frustrates the statutory goal of localism of civic discourse to ensure local content and a local focus for news.[132]

Thus, the Commission Notice has not established the case for abandoning structural policies that promote "the widest possible dissemination of information from diverse and antagonistic sources" has not been made. The empirical facts continue to show separate media markets meeting different needs that remain highly concentrated. If any trend is discernable, concentration of ownership is becoming more severe, not less. Technology growth does not blunt the impact of this trend. The dominant players in one product space are becoming the dominant players in the others. The Commission needs a more penetrating understanding of the media marketplace than presented in the Notice as it moves forward to consider the economics of the commercial mass media.

B. DIFFERENTIATED, SEPARATE MASS MEDIA MARKETS

While the advocates of convergence equate all media, the reality is that different media serve different needs, have different content, and differ widely in their impact and effect. The data below show that people use different media in different ways, spend vastly different amounts of time in different media environments, consume services under different circumstances and pay for them in different ways. As a result, competition between the media is muted in the marketplace and, in some respects, the specialization of each is worth preserving because of the unique functions provided in the marketplace of ideas.

Exhibit III-2 provides a description of the key characteristics of the relevant media market, including audience size, media use and advertising spending over the past decade and a half. We include daily entertainment/information media, since they are most directly relevant to the central civic discourse concerns of public policy. Exhibit III-3 shows the 1999 breakdown of advertising revenues, which underscores the fact that these are distinct markets.

EXHIBIT III-2:
MEDIA MARKETING DATA

	1985	1993	1998	2000p
UTILIZATION (% OF HHI with)				
Broadcast	85	93	98	98

[132] See 47 USC at 307 (b).

Cable	43	61	67	69
Radio	99	99	99	99
Newspaper	63	60	56	.
Internet	0	0	33	45
UTILIZATION (% of Adults Reporting Use)				
Broadcast	92	93	92	94
Cable	48	60	70	71
Radio	85	86	84	84
Newspaper	85	84	80	79
Internet	0	0	33	45
HOURS PER ADULT (per year)				
Broadcast	1320	1082	884	805
Cable	210	453	689	786
Radio	1200	1082	1050	1024
Newspaper	185	170	156	152
Internet	0	2	74	122
Total	2915	2789	2853	2889
ADULT POP. (Million)	175	191	200	
AUDIENCE (Pop x Hours, billion)	510.1	532.7	570.6	
MARKET (constant 1998 $) (Pop x Income, billion)	2804	4043	4646	
DISPOSABLE INCOME				
Nominal	12941	19121	23231	
Real, 1996$	18229	20384	22569	

Source: U.S. Census Bureau, *Statistical Abstract of the United States: 2000* (U.S. Department of Commerce, 2000), Tables 17, 722, 909, 910, 911, 931, 932, 937, and various equivalent table in earlier editions.

EXHIBIT III-3:

ADVERTISING DATA

ADVERTISING (Billion $, Nominal)	1985	1993	1998	1999p
Broadcast	14.6	28	39	41
Cable	0.7	4	8	10
Radio	6.5	9	15	17
Newspaper	25.2	32	44	47
Internet	0	0	1	2
Total	47	73	108	117
Constant 1998 $				
Broadcast	18.1	31	39	
Cable	0.9	4.4	8	
Radio	8	10	15	
Newspaper	31.2	35.4	44	
Internet	0	0	1	
Total	58.2	80.8	108	

DISTRIBUTION OF NATIONAL AND LOCAL ADVERTISING AND TOTAL REVENUE BY MEDIA TYPES

	DISTRIBUTION WITHIN MEDIA TYPES PERCENT OF MEDIA ADVERTISING			% OF TOTAL REVENUE FROM NATIONAL ADVERTISING	DISTRIBUTION OF ADVERTISING ACROSS MEDIA TYPES NATIONAL		LOCAL	
	LOCAL	NTL	TOTAL		$	%	$	%
NEWSPAPERS	87	13	100	6	41	59	6	13
RADIO	76	24	100	23	13	19	4	9
CABLE	30	70	100	25	3	4	7	16
BROADCAST	32	68	100	68	13	19	28	62
TOTAL	61	39	100		70	100	45	100

Source: Calculated from Exhibit 1 and U.S. Census Bureau, *Statistical Abstract of the United States: 2000* (U.S. Department of Commerce, 2000), Table 908, 927, 937.

Each of these media types largely occupies a separate product space. Competition across these product categories is weak at best. While there is some overlap, or competition at the edges of each product space, the core of each is insulated from competition from the others. Some market characteristics have changed since many of the media ownership rules were first enacted, but it is not clear that those changes require us to alter dramatically the longstanding public policies that prevent excessive control or influence over mass media, to promote diversity, and to ensure the availability of public interest/locally-oriented programming.

There are those who would like to believe that the Internet provides a new form of more meaningful local content There may be those who hope that cable might someday have a larger impact on the prime time TV market. However, wishful thinking cannot provide the market forces necessary to discipline a product space that neither the Internet nor cable TV have as yet successfully entered or occupied. The fact that the product spaces were different in the past or may be different in the future cannot provide market discipline in the present.[133]

The analysis that follows, combined with the analysis of concentration vertical integration in the next section, demonstrate that television and newspapers do not compete with each other, and that each market is dangerously concentrated. The continuing importance of television and newspapers in civic discourse, the distinct functions that these media play in civic discourse, and the continuing concentration of these markets justifies the continued prohibition on cross-ownership

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[133] Kraus, S and D. Davis, *The Effects of Mass Communications on Political Behavior* (University Press, 1996). Tankel, Johnathan David and Wenmouth Williams, Jr., "The Economics of Contemporary Radio," *Media Economics: Theory and Practice,* 2nd ed., Alison Alexander, James Owers and Rod Carveth, Eds. (Lawrence Erlbaum Associates, 1998).

1. BROADCAST/NETWORK TV

TV networks still dominate the most valuable viewing time – prime time – and capture the lion's share of national advertising dollars. They can be considered "prime-time programming juggernauts."[134]

Network advertising revenue growth has far outstripped population growth or any change in viewing habits. Advertising revenue has grown about 117 percent as compared to adult population/audience, which has grown by about 14 percent or the total market (measured by household income that has grown by about 65 percent. Based on these entertainment/information media, broadcast's share of the total advertising pie has increased from 31 percent to 36 percent since 1985.

TV networks are in a different class than the other media in terms of advertising dollars. Broadcast remains in a different category than cable. Cable TV has only captured a limited amount of prime time, but has captured significant numbers of viewers during non-primetime hours. This is the primary reason cable's average advertising rates remain low in comparison to broadcast.[135]

TV ratings and audience market shares show that the networks dominate prime time. The top 20 or so TV shows are all prime time network products.[136] They fill about three quarters of the weekly prime time viewing hours (8 pm to 11 pm). The top 20 shows capture between 150 and 225

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[134] This is how CEO Sumner Redstone is reported to have referred to Viacom/CBS, *Communications Daily*, December 5, 2000 cited in Network Affiliated Stations Alliance, *Petition for Inquiry Into Network Practices*, March 8, 2001 (hereafter NASA Petition).

[135] Waterman, David and Michael Zhaoxu Yan, "Cable Advertising and the Future of Basic Cable Networking," *Journal of electronic Media and Broadcasting,* 1999 (Fall); Survey evidence indicates that advertisers think cable and broadcast are "substitutes" for each other, but the market shares do not (see Reid, Leonard N., Karen Whitehill King, "A Demand-Side View of Media Substitutability in National Advertising: A Study of Advertiser Opinions about Traditional Media Options," *Journalism & Mass Communication Quarterly,* 2000 (77).

million household hours of viewing per week. Almost all of it these shows are original network programming. A small amount, 10 to 20 million households might be viewing a network movie.

Cable's top products are quite different. Of the top twenty cable network shows, about half are in prime time. They capture 20 to 40 million household hours. About half are rerun movies, not original programming.

Equally important for public policy is the central role that the networks play in dissemination of news. Television has been the primary source of news for over a decade. On average, each night between 20 and 25 million households tune in to the early evening flagship news shows on the three major networks. In contrast, the four major cable news networks capture about 3 million viewers over the course of their entire early evening/ prime time news offering.

Combining news and all of primetime, which is the networks' bread and butter, the big three networks capture about ½ billion household hours of weekly viewing, including of course the dominant news shows. The top three cable networks capture about 1/5 of that and provide virtually no news.

Network TV is primarily a nationally-oriented medium. TV networks dominate the national video product space with original prime time programming. Nevertheless, local advertising revenues and local stations play an important role in the TV market. The tension within the traditional broadcast industry has been fueled by the conflict of economic interests between local stations and national networks. This tension bears directly on the provision of local content, one of the most prominent aspects of policy in electronic media.[137]

The Facts Cited About Broadcast TV Stations In The Notice Do Not Provide A Basis For Abandoning Structural Regulation.

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[136] The following discussion is based on Nielson ratings from Spring 2001.
[137] NASA Petition.

With respect to broadcast outlets, the Notice paints a bright picture of increasing numbers (see Exhibit III-4). There has been a substantial increase in the number of full power stations and a very large number of low power stations. These numbers include a substantial increase in the number of noncommercial stations.

Although the number of broadcast TV outlets has grown, the analysis cited by the Notice suggests that the number of news operations at those stations has not grown by nearly as much. Indeed, the best evidence suggests that it has declined by about 10 percent.

The Notice is not careful in its analysis and implies increases in news sources not supported by its sources. For example, while the Notice implies that the addition of the Fox network added news programming, the cited source, Vernon Stone, indicates otherwise.

The Notice cites Vernon Stone's analysis of TV newsrooms,[138] stating that

> In addition approximately 77% of commercial TV stations provide local news. Virtually all affiliates of ABC, CBS, and NBC provide local news, and approximately one- third of other broadcast TV stations do. This later group includes stations affiliated with the Fox network, which did not even exist in 1975.[139]

[138] Stone, Vernon, *New Operations at U.S. TV Stations.*
[139] Notice, p. 8.

EXHIBIT III-4:

OWNERSHIP AND EXTENT OF NEWS OPERATIONS

	1975	2000
TELEVISION		
Outlets		
Full Pwr	952	1678
Low Pwr	Na	2396
Owners	543	360
Newsrooms	940	850
Staff/Newsroom		24
DAILY NEWSPAPERS		
Outlet	1756	1422
Owners	863	290
Newsrooms	1756	1422
Staff/Newsroom		62
RADIO		
Outlets	7785	12932
Owners	5100	3800
Newsrooms	~ 6000	4500
Staff/Newsroom		3

Vernon Stone, News Operations at U.S. Radio Stations, News Operations at TV Stations;
U.S. Bureau of the Census, Statistical Abstract of the United States: 2000 Tables 2, 37, 932
George, Lisa, *What's Fit to Print: The Effect of Ownership Concentration on Product Variety in Daily Newspaper Markets* (2001); *Editor and Publisher, International Yearbook,* various issues.

Stone actually said the opposite.

> The mid-1990s influx of Fox newsrooms in large TV markets brought a small increase in the number of news operations. Most of the affected stations already had newsrooms, albeit token ones in a number of cases.[140]

Moreover, contrary to the Commissions inference that local news programming has increased, Stone explains that the FCC's repeal of rules requiring a programming studio reduced the amount of news programming since 1975. As he put it

> prior to the 1984 deregulation which threw out the rule that in effect required information programming, practically all TV stations had at least token news operations – 99% in my 1972 and 1982 surveys.[141]

In other words, there has been a dramatic decline in the rate at which TV stations have news operations, almost a 25 percent decline. By Stone's reasoning, with virtually every "viable commercial" [142] TV station having a newsroom in 1975, there were about 950 such operations. By 2000, Stone estimates that only 850 did. In other words, by this reasoning there has been a 10 percent decline in local news operations of TV stations. At a minimum, the dramatic growth in the number of stations does not extend to the number of TV news operations.

The mixed picture we get by looking at news operations (rather than stations) gets much darker when we consider ownership of TV stations. The Notice recognizes a sharp decline in the number of owners in spite of the growth of the number of stations. There are now fully one-third fewer broadcast owners today than there were twenty-five years ago. Local marketing agreements hide even greater diminution.[143]

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[140] Stone, TV Stations, p. 2.
[141] Stone, TV Stations, p. 2.
[142] Stone refers to "viable commercial TV stations.
[143] "Sinclair Issues a Challenge to FCC, Powell," *electronic Media*, Ocotber 15, 2001, p. 9.

Growth in the number of stations has not resulted in competitive markets at the local level. As described in the next section, when measured by local viewing market shares, virtually all broadcast markets in this country are highly concentrated (i.e. with the equivalent of fewer than six equal sized firms). As described in the next sections, about 40 percent have the equivalent of five stations and another 40 percent have the equivalent of four.

2. RADIO AND NEWSPAPERS

Newspapers and radio serve local markets. They capture a very different type of advertising dollar than TV. National advertising accounts for a modest share of radio and newspaper revenues. Newspapers dominate the local advertising market with classified ads comprising the majority of newspapers' revenues.[144]

Radio, newspapers and magazines are substitutes from an advertiser's perspective. There is some evidence that cable and newspapers are cross elastic, which reflects the fact that they are both local. Radio and newspapers occupy the non-video local product space.[145] The stability of their market shares indicates that they are not likely to be greatly eroded by new media in the near term.[146]

Newspapers and local TV stations have a complex relationship in the advertising market. Newspapers dominate classified advertising. Local TV stations dominate advertising for local political campaigns. For certain types of products they have a complementary relationship, with

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[144] Reid and King.

[145] Busterna, John, "The Cross Elasticity of Demand for National Newspaper Advertising," *Journalism Quarterly,* 1987 (64); Sentman, Mary Alice, "When the Newspaper Closes," *Journalism Quarterly*, 1986 (63)

[146] Nowak, Glen J., Glen T. Cameron, Dean M. Krugman, "How Local Advertisers Choose and Use Advertising Media," *Journal of Advertising Research,* 1993 (Nov/Dec), find that targeting is the critical factor for local advertising. When interactive video media develop an effective targeting approach, an issue that is receiving significant attention, it

newspapers providing much more detailed product promotion (particularly price). The differences between the media types in news gathering and analysis between TV and newspapers discussed generally in the previous section apply to the local market.[147] Thus, in the important area of civic discourse they do not compete and in a significant part of their commercial activities they do not compete.

Radio has fallen into a special niche – it serves as background for people as they engage in other activities such as working or driving."[148] This specific function of the radio may derive from the different demands it places on the listener.[149] In this niche, radio is not a primary source of news. Radio is the least often cited of the sources of information among the three traditional media.[150]

The Facts Cited About Newspaper and Radio In The Notice Do Not Provide A Basis For Abandoning Structural Regulation.

The Notice recognizes that in the twenty-five years since the adoption of the rule restricting cross-ownership of newspapers and broadcast, daily newspaper operations have declined (see Exhibit III-5). The number of dailies has declined by about 19 percent. Their circulation has

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could infringe more on the local revenue stream of radio and newspapers. The failure of the Internet to develop that local focus may account for the slow growth of advertising revenue garnered by that medium.

[147] Schwartzman Andrew J. and Blau, Andrew, *What's Local About Local Brodcasting* (Media Access Project and the Benton Foundation, 1998), found virtually no local public affairs programming and what little there was aired at times that it was not likely to attract much of an audience.

[148] Johnson, Thomas J., Mahmoud A.M. Braima, Jayanthi Sothirajah, "Measure for Measure: The Relationship Between Different Broadcast Types, Formats, Measures and Political Behaviors and Cognitions," *Journal of Broadcasting & Electronic Media,* 2000 (44), p. 45. See also, Chaffee S. H. and S. Frank, "How Americans Get Their Political Information: Print versus Broadcast News," *The Annals of the American Academy of Political and Social Science*, 1996 (546).

[149] Stempell, Hargrove and Bernt, pp. 77, point out that the different demand may enable radio to continue its role even as the new media expand.

> Information seeks can listen to the radio while they are using the Internet. Obviously, they are not going to be paying full attention to both, but one involves seeing and the other involves listening, so both can be used at the same time.

[150] The Pew Research Center reports that fewer than half of all respondents to a mid-2000 survey listened to the radio for news regularly compared to two-thirds who read a newspaper and three quarters who watched TV.

declined by about 10 percent. The number of weeklies has declined slightly (3 percent) but circulation has increased sharply (by 128 percent).

The Notice implies that the increase in weekly circulation balances the loss of daily circulation. Whether weeklies should be compared directly to dailies from the point of view of providing news and information is debatable, since much of the news they provide is not timely. Moreover, their focus tends to be quite different than the daily press. The community-oriented weeklies have a "promotional flavor" and are "strong on neighborhood shopping advertisements but relying heavily on press releases for editorial content."[151] They focus on "life style and consumer issues" and "have not challenged the metropolitan newspaper's news and editorial coverage of major urban and regional issues."[152]

At a minimum, any comparison must recognize the fact that we need to calculate total weekly circulation. Dailies come out every day, weeklies come every seven days. By this standard, the total number of weekly plus daily newspaper editions printed per week has decline by about 3 percent and circulation has been constant. Thus, at best, excluding the qualitative difference, no change has occurred.

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[151] Kaniss, Phyllis, *Making Local News* (University of Chicago Press, Chicago: 1991), p. 154.
[152] Kaniss, p. 159.

EXHIBIT III-5:

CHANGING NUMBER AND CIRCULATION OF NEWSPAPERS

		1975	2000	% Change
Daily	Papers	1756	1422	-19.0
	Editions/week	11292	9954	-11.8
	Circulation (million)	424	381	-10.1
Weekly	Papers	7915	7652	-3.3
	Editions/week	7915	7652	-3.3
	Circulation (million)	36	82	127.8
Total Print	Papers	9761	9075	-7.0
	Editions/week	19207	17606	-8.3
	Circulation (million)	460	463	0.7
Demographics	Population (million)	216	275	27.3
	Incorporated Places	18880	19362	2.6

Notice, p, 6
U.S. Bureau of the Census, Statistical Abstract of the United States: 2000
Tables 2, 37, 932

Thus, the total number of newspapers has fallen. This decline becomes even more apparent when one considers the population and places that this shrinking number of papers serves. The population served by this lower number of papers has increased by 32 percent.[153]

Virtually all newspapers are local (although chains are changing that) in the sense that they serve a defined geographic area. Most newspapers use the name of the place in their title. Daily newspaper markets have become highly concentrated, if not monopolies. The vast majority of places that have newspapers have only one (as Exhibit III-6 shows). Even cities as large as half a million now average one or fewer papers per city. Only the very largest cities have a hint of newspaper competition, averaging three per city.

As discussed below (see Table IV-1), the most common measure of market concentration – the HHI index – reveals that on average, there 2 to 3 papers per community that is served by a newspaper. This is the implication of an average HHI index is about 3000

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[153] In the past, the Commission has rejected the claim that its analysis must take population growth into account. It argued in the case of over-the-air television that since every broadcast signal was available to every potential listener in an audience, the number of people did not affect the availability of diverse sources of information. Everyone could get every station, so the population did not matter. That might have been true in that context, but this Notice makes a very different argument about outlets (*1984 Onwership Order*, 100 F.C.C. 2d at 37-42 (1984)..

In the discussion of newspapers, for example, the Notice balances the decline in daily newspapers, which tend to available throughout a broad area, with an increase in "smaller, more targeted weeklies." More targeted newspapers may not be available to the broader population on the same basis as the daily papers. Since these papers geographically target subsets of the population, the size of the place matters. Since one-fifth of the total weekly circulation is now composed of targeted weeklies, we should ask about population and places served.

Similarly, in counting the number of TV stations, the increase in low power stations cited far exceeds the number or the increase in full power stations. Again the coverage of the population is an important question.

Finally, multichannel distribution and the Internet, which are two new forms of information distribution to which the Notice points as a sign of change, are not free, over-the-air. They require subscription payments (free Internet service providers have all but disappeared). They raise the question of availability and affordability.

Thus, growth in the population and the places served is relevant to the current proceeding and it underscores the basic observation about the newspaper industry. We observe that there are fewer papers, with fewer editions and constant circulation serving many more people and places.

EXHIBIT III-6

NEWSPAPERS BY SIZE OF PLACE

	1970			1999		
	Papers	Places	Avg. Papers/ Place	Papers	Places	Avg. Papers/ Place
MORE THAN 1 MILLION	27	6	4.50	28	9	3.11
500K TO 1 MILLION	50	20	2.50	31	17	1.82
100K TO 500K	220	127	1.73	191	192	0.99
50K - 100K	243	232	1.05	219	354	0.62
25K TO 50K	309	455	0.68	247	622	0.40
LT 25K	914	17826	0.05	758	17826	0.04

U.S. Bureau of the Census, Statistical Abstract of the United States: 2000
Tables 37, 933

- 6000. The implications are that any merger or acquisition between newspapers and broadcasters in a community involves a firm that is likely to have a monopoly or certainly substantial market power within the newspaper product space.

The shrinkage of outlets in the newspaper market is compounded by the dramatic reduction in the number of owners (as Exhibit III-3 shows).[154] We estimate that the number of owners has declined by two thirds (from 860 to 290). Combining the newspaper and television ownership numbers, as the dominant form of news disseminating media, we find that the number of independent voices has been cut in half since the adoption of the rule.

While radio station numbers have increased significantly, the number of owners has declined, as is the case across all the traditional media. As has been the case with TV, while the number of stations has been increasing, the number of newsrooms has been declining.[155] Interestingly, the same policy decisions that have reduced the number of TV stations doing news affected the radio market.

> Most must stations dropped news after 1984, when the FCC lifted its requirement that all radio stations must include a certain amount of news and information in the programming schedule.[156]

The small size of newsroom staffs for radio limits their ability to add diversity to civic discourse at the level of information. The concentration of radio ownership into chains has cut back on local reporting.

> Metro Networks alone is – by far – the largest producer of radio news in the country. Although its name is never mentioned on the air, Metro provides newscasts to some one hundred fifty-five stations and seventeen hundred radio stations. Its *average*

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[154] *Editor and Publisher International Yearbook*, various years. We have calculated the total number of owners by treating all groups listed in the yearbook as a single owner.

[155] Stone, Vernon,

[156] Bachman, Kathy, "Music Outlets Tune in More News Reports," *MediaWeek,* October, 29, 2001. The article notes that these music stations are adding news, but it takes the form of a minute an hour from a national services, hardly representing either an independent or local voice.

> market penetration is twenty-three affiliates per market. Metro says that it provides news services in sixty-seven of the top seventy-five markets, and that its newscasts are heard by one hundred million people every day. It brags to advertisers that it offers them "the opportunity to reach a broad-based local, regional [,] or national audience, through a single purchase of commercial airtime inventory" by Metro.
>
> In a large market like Baltimore, which has forty radio stations and twelve TV stations, I believe Metro provides all or most of the news to about twenty-five radio stations – well over half – and two TV stations.
>
> So much for diversity. There is now, at most, one reporter covering City Hall for all those stations. There is no one to bring a different perspective, to provide the safety valve for a lazy, or even corrupt reporter willing to overlook a story for the wrong reasons.[157]

The radio talk show format has become popular, however. As a general matter, however, radios have not changed the environment of civic discourse sufficiently to warrant abandoning structural regulation to promote diversity.

3. MULTICHANNEL VIDEO

Cable provides local distribution of video content primarily capturing non-prime time viewing. Cable TV has taken a substantial bite out of non-network network TV viewership (as shown in Exhibit III-2). While total hours watching TV have been almost constant over the past fifteen years, cable's share has grown from 14 percent to almost 50 percent.

Cable systems operators are the local distribution system for cable, franchised at the local level, although federal preemption has scaled back the role of local franchising authorities. Lately there has been a strong trend to regionalizing the local cable companies so that contiguous areas are joined under one company.[158] The large national cable networks built up over the past couple of

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[157] Schwartzman, Anderw J., "Viacom-CBS Merger: Media Competition and Consolidation in the New Millenium," *Federal Communications Law Journal* 52 (2000), p. 516.

[158] Federal Communications Commission, *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report*. CS Docket No. 00-132 (hereafter, FCC, Seventh Annual Report).

decades have been created by buying up small MSOs. There has also been a strong trend toward vertically integration into programming, primarily by purchasing libraries of programs and sports entertainment. Cable has become a local distribution mechanism for national programming.

In contrast to network TV, which is funded entirely by advertising, cable is funded primarily by subscription revenues although national advertising revenues have been growing. Local advertising still plays a small role in cable and cable plays a small role in the local advertising market. Newspapers account for 13 times as much local advertising revenue and radio accounts for four times as much, as shown in Exhibit III-2.

Satellite occupies a much narrower product space than cable. It is a high-cost, niche distribution system. Given its cost characteristics, it does not compete with basic cable. Given that satellite still lacks robust local programming and its lack of original prime time programming, it is not yet a substitute for network TV or cable.

During the decade of the 1990s, satellite filled out its niche. It now has about 16 million subscribers, compared to cable's almost 70 million. However, it has failed utterly to control the abusive pricing practices of cable.[159]

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[159] Mundy, Alicia, "The Price of Freedom," *MediaWeek,* March 29, 1999, p. 32.

> Congress has been moving at an unusual speed to pass a bill that would give DBS providers the right to beam local network signals to local subscribers …
>
> "It's not a cure-all," said Hartenstein, who has run DirectTV since its inception in 1990. For one thing, Hartenstein's business plan is not based on beaming local network signals to his customer base, soon expected to top 9 million. Instead, he is suggesting that subscribers buy new antennas to supplement their coverage. DirecTV is working with retailers to have the specialized antennas available at reduced prices. He calls this program "Distant/Terrestrial," meaning he sends you all the cable and movie channels you could dream of (for which he can charge), and you pick up the free network feeds with an extra antenna.
>
> Furthermore, Hartensteins' game plan does not include fighting for cable customers by undercutting cable prices. Analysts for the DBS and cable industries have figures out that the average American homeowner will cough up $30 per month for TV. Above that level, both camps believe, many consumers will bolt and run. Hartenstein seems determined to compete on quality and depth of service, not price.

DBS's large channel capacity and high front-end costs dictate the packaging of large numbers of high priced channels and/or long-term contracts. As a result, DBS is a small competitive fringe that is not capable of disciplining cable TV pricing. DBS still costs more than basic cable as cable does, not including the front-end system costs, which undermines its ability to compete on price.[160] Cable makes much more money by increasing prices for basic cable than competing in the DBS niche. Even in the midst of the debate over delivery of local stations by satellite, the largest satellite provider made it clear that price competition for the basic package was not in the offing.

The failure of satellite to discipline cable pricing abuse and the failure of cable to compete with local telephone service are among the greatest disappointments of the 1996 Telecommunications Act and they tell a great deal about the prospects for cross technology competition. Congress had great hopes for this form of competition. In fact, the only facilities-based competitor for local telephone service actually mentioned by the Act's Conference report was cable TV.[161] Similarly, Congress devoted a whole section to telephone competition for cable through open video systems.[162] Neither of these has proven effective competition. Open video systems are non-existent[163] and the only telephone company that has pursued entry into the cable business as a plain overbuilder -- Ameritech -- was purchased by another telephone company -- SBC -- that is exiting the cable business.[164]

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[160] Federal Communications Commission, *Pricing Analysis,* February 2001. the study did find a weak subscriber effect. Even though satellite is not cross elastic on price, larger satellite subscribership does have a small effect in taking subscribers away from cable. There is also evidence that satellite is much more effective where cable quality is weak. Neither of these observations is inconsistent with our argument that satellite is not sufficiently competitive to discipline cable pricing.

[161] Pub. L. 104-104, Conference Report, p. 148.

[162] Title II, part 5.

[163] Federal Communications Commission, *Seventh Annual Report In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, January 8, 2001.

[164] FCC, Seventh Annual Report

The failure of competition in multichannel video is evident in local markets. Approximately 95 percent of the homes passed in the country are served by only one cable company.[165] On average, cable operators have an 85 percent market share for multichannel video at the local level.[166] In fact, since satellite is concentrated in rural areas where cable is not available,[167] cable's market share in areas where they are both present is higher. The HHI index at the local level is above 7000, indicating an extremely highly concentrated market for multchannel video service.

The Facts Cited About Multichannel Video In The Notice Do Not Provide A Basis For Abandoning Structural Regulation.

Above we noted the shifting patterns of viewership between cable and broadcast. We have also pointed out that the viewing of news shows has not changed as much as entertainment. The notice gets this wrong. It states that "studies suggest that some Americans are turning to the Internet for news instead of TV, in particular broadcast TV."[168] It cited a Pew Research Center study as support for this proposition. Unfortunately, the Notice did not look carefully at the cited research from the point of view of diversity. The data actually can be read to indicate that sources are becoming more concentrated, not less, from the point of view of source diversity (as Exhibit III-7 shows).

It is certainly true that network news and network news magazine shows have lost some viewership. However, so have the major non-network (cable) shows like CNN and C-Span. Where did the viewers go? They went to the cable-based offerings of the network stations. In other words, while viewing may be shifting from over-the-air to through-the-wire, according to this data, it is actually becoming more concentrated in the major networks.

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[165] FCC, Seventh Annual Report

[166] FCC, Seventh Annual Report

[167] Consumers Union Cable and Satellite Survey gives a figure of 40 percent of satellite subscribers who do not have access to cable.

It is important to note that viewership of local broadcast news has not dropped off, in spite of the growth of local cable news. Although this would appear to suggest some increase in institutional diversity of sources, the growth reflects a significant amount of shift of viewing from over-the-air to through-the-wire. To the extent that there is a new source of local news, it has taken place with prohibitions on cable broadcast cross ownership and limits on national broadcast ownership in place, we would argue that it is important to keep those policies in place to preserve those gains.

4. THE INTERNET

The Internet has not yet evolved into a ubiquitous mass communications medium that can challenge the other media. It accounts for less than 4 percent of viewing hours and

[168] Notice p. 8.

EXHIBIT III-7:

WATCHING TV NEWS PROGRAMS
(Percent of Respondents

	1993		1999	
	Sometimes or Regularly	Regularly	Sometimes or Regularly	Regularly
NATIONAL				
Network News	81	58	58	30
Network Magazine News	89	52	75	31
CNN	69	35	55	21
C-Span	36	11	21	4
FOX CABLE	na		45	17
CNBC	na		42	13
MSNBC	na		38	11
LOCAL				
Broadcast	83	77	80	56
Cable	na		51	29

Pew Research Center, Internet Sapping Broadcast News Audience, June 11, 2000 advertising dollars. It appears to occupy a new media space.[169] It provides a national, non- video product.[170] The Internet is starting to look a lot more like cable than broadcast in its revenue model.

For example, AOL's bundling is like cable's bundling, adding more and more features that glue in different segments of the market. AOL makes much more in subscription revenue then the entire Internet generates in advertising revenue.[171] This is somewhat greater than the proportion of subscription to advertising on cable. The enthusiasm for the AOL Time Warner merger derives in part from the fundamental similarity of the subscription based models of cable TV, print publications and the Internet.[172]

In this subscription model people pop on an off to meet their short, narrowcast needs, but are not glued to the tube and do not generate a great deal of advertising (or, for the moment ancillary revenues). It is a personal productivity device particularly well-suited to information intensive users.[173] For the vast majority, it is a shopping mall at the fingertips of subscribers, enhancing daily activities. Internet traffic is made up of few hours on online time per week spread over a dozen

[169] Stempell, Hargrove and Bernt, p. 75 present the results of a unique longitudinal study that allowed for careful elaboration of research findings. They emphatically reject the notion that the Internet is stealing attention from other media.

> Our finding seem consistent with the speculation from many quarters that the Internet has taken people away form other media. However, [it], tells a different story. Almost exactly half of our sample indicated they are using the Internet at least once a week, so we compared use of other media by those who use the Internet and those who do not. Users and non-users of the Internet both used network TV news to about the same extent. Those who use the Internet were slightly less likely to use local TV news, but the difference was not statistically significant. Those who use the Internet were more likely than those who don't use it to be regular newspaper readers and regular radio news listeners. So the Internet is not stealing readers from newspapers or listeners from radio.

[170] It can be argued that before the advent of TV, radio occupied this product space (see Tankel and Williams).

[171] A low estiate of AOL subscribption revenues is $8 billion. Internet Advertising revenue is estimated in the range of $1-2 billion.

[172] Walls Street Analysts praised the merger on these grounds. Xxx see CFA/CU docuemnt

[173] Stempel, Hargrove and Bernt, p. 78.

> Clearly an information seeking device helps explain the greater newspaper use by Internet users, and this information-seeking behavior may run two ways. Internet users may turn to their newspapers or newspaper readers may go to the Internet for more information on a given topic. Either is possible sequentially as a supplemental information-seeking behavior. What is at least not practical is going from either the Internet or the newspaper to TV news to seek additional information on a given topic. TV news is not organized in a way that makes this practical or even possible in many cases.

sessions with a minute or so at any given page. The leading advertisers on the Internet are a completely different group than one sees on television.[174]

Given the current state of affairs in which the same few companies own monopoly delivery wires, cable TV stations, and dominate high speed Internet the prospects that the Internet will be a liberating, democratizing medium seem to be fading. Moreover, given the current state of the dot.bomb revolution, relying on the Internet to discipline powerful media giants is wishful thinking at best.

The Facts Cited In The Notice About the Internet Do Not Provide A Basis For Abandoning Structural Regulation.

Ironically, after the notice incorrectly attributes the decline in broadcast TV viewership to the Internet, it did raise other questions about the ability of the Internet to steal eyeballs from the networks. The Notice stated that

> The growth of news-oriented websites likewise might not be considered particularly significant, because many do not focus on local news and information, and those that do are often operated by existing local media, such as broadcast stations and newspapers.[175]

The Notice does not explore this issue, but it footnotes an article observing that many online journalism companies are going out of business. In fact, the Pew study cited by the Notice has data that shows that this problem existed before the Dot.Coms turned into Dot.Bombs. The survey, conducted in mid-2000 asked respondents whether they had ever heard of a specific online news sources and whether the sources are believable. Respondents were much more familiar with the web sites of existing broadcast and newspaper firms and found them much more believable (as

[174] This discussion is based on Nielson ratings for May and June 2001.
[175] Notice, p. 9.

Exhibit III-8 shows). Many fewer respondents had never heard of the TV and major newspaper related sites. Those sites are also much more likely to be said to be believable.

The use of online media has not substantially changed individual news sources. Exhibit III-9, constructed from the Pew research cited in the Notice makes this clear. Of the three media, TV has lost the least viewership for regular attention. The emergence of use of online media to access news may have reduced radio and TV viewing somewhat, but not a great deal.

A recent study from the UCLA Center for Communications Policy reinforces this point.[176] Respondents report spending about 4 minutes per day on line gathering news. They report about 25 minutes per day reading the newspaper. The Pew study shows the respondents spent over half an hour a day watching TV news and 15 minutes a day listening to radio news. In other words, traditional media account for twenty times as much news gathering time as the Internet.

[176] *Surveying the Digital Future,* Movermber 2001.

EXHIBIT III-8

FAMILIARITY WITH ONLINE NEWS SOURCES

	BELIEVE	NEVER HEARD OF
SLATE	2	68
SALON	3	65
ABOUT	10	55
ZDNET	12	56
GO	14	49
CNET	21	41
LYCOS	24	38
AOL	39	22
NETSCAPE	39	20
FOX	41	16
NYT	41	16
USATODAY	51	12
MSNBC	54	11
YAHOO	54	8
ABC	56	11
CBS	58	11
CNN	61	10

Pew Research Center, Internet Sapping
Broadcast News Audience, June 11, 2000

EXHIBIT III-9:

SOURCES OF NEWS

	1990/91	1998/99
REGULARLY		
TV News	80	75
Newspaper	71	63
Radio	56	46
YESTERDAY		
TV News	68	62
Newspaper	56	47
Radio	44	44
On-Line		21

Pew Research Center, Internet Sapping Broadcast News Audience, June 11, 2000

IV. MARKET POWER PROBLEMS IN CONCENTRATED, INTEGRATED MEDIA MARKET

A. SUMMARY

This section examines traditional failures in media markets – horizontal concentration and vertical integration. Elaborating on the earlier discussion on which found a declining number of owners, this section introduces formal measures of concentration of markets. Viewed separately, each of these markets is concentrated, most are highly concentrated. Newspapers, radio stations and cable TV stations have experienced substantial consolidation in the last fifteen years and have become highly concentrated. Network TV remains a concentrated market. The Internet has become more concentrated more quickly than anyone dreamed, when measured either in terms of subscribership or usage.

While there is no doubt that consumers have the option of receiving news, information, entertainment from a greater variety of media – newspapers, radio, television, the Internet – unfortunately, this growth in variety has not been accompanied by a comparable growth of independent, diversely owned competitive communications services and media voices. Rather than the cross-market competition envisioned with the enactment of the 1996 Telecommunications Act, virtually every communications and media sector has witnessed an explosion of consolidation.

The two major communications wires into the home, telephone and cable are now controlled by a few super-regional companies that focus their business on dominating their respective markets rather than challenging each other's core business. Satellite companies still cannot compete on price with cable monopolies. Radio and newspaper chains grow larger, and national broadcast networks continue to buy more local broadcast stations. And on the Internet, where "the number of potential online channels is infinite," about one-third of user minutes were controlled by cable giant AOL Time Warner last year.[177] This consolidation has not opened the door to new competition. Contrary to the claims of the major players in each communications sector, Internet service providers, national broadcast networks, newspaper and radio chains, and cable companies do not compete in a meaningful way against each other for consumers' news, information, entertainment and other communications needs.

With virtually all local media markets at least moderately concentrated and the broadcast and newspaper product markets separate, we find that the cross-ownership ban serves an important purpose. The cross-ownership ban prevents mergers that would be considered vertical or

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[177] "Online Media Consolidation Offers No Argument for Media Deregulation," Jupiter Media Metrix, Inc. June 4, 2001.

conglomerate. These mergers are most often described as product extension mergers where two distribution mechanisms (TV and print) would share an input (newsroom operations).

A review of the literature on vertical and/conglomerate mergers identifies major concerns about such mergers in markets that are as concentrated as most media markets. A range of anti-competitive tactics can be employed by dominant players merging in these kinds of markets. Anticompetitive outcomes that are a concern in other industries take on special importance in the media markets because of their impact on consumers and citizens. Therefore, we conclude that more rigorous standards should be applied to evaluate mergers and other anti-competitive activities in this industry.

B. MEASURING MARKET CONCENTRATION

To understand the justification for concern in these markets we can refer to the U.S. Department of Justice (DOJ) merger guidelines.

The DOJ defines market levels of concentration to determine the extent of review of mergers.[178] DOJ is unlikely to challenge mergers between companies in markets that are in unconcentrated. To make this assessment, it calculates the index of concentration known as the HHI (Hirshman-Herfindahl index). [179] Another way to quantify market concentration is to calculate the market share of the largest 4 firms (4 firm concentration ratio or CR4).

[178] U.S. Department of Justice, *Merger Guidelines*, revised 1997.

[179] Shepherd, William, G., *The Economics of Industrial Organization* (Prentice Hall, Engelwood Cliffs, N.J., 1997, Fourth edition), p. 389, gives the following formulas for the Herfindahl-Hirschman Index (HHI) and the Concentration Ratio (CR):

$$H = \sum_{i=1}^{n} S_i^2$$

Under Merger Guidelines issued early in Ronald Reagan's first term, the DOJ considers a market with an HHI of 1000 or less to be unconcentrated. Such a market would have the equivalent of ten equal sized competitors. In such a market, the 4-firm concentration ratio would be 40 percent (see Exhibit IV-1). Any market with a concentration above this level was deemed to be a source of concern and increases in concentration through mergers would receive scrutiny.

The DOJ considers a market with an HHI of 1800 as the point where a market is considered highly concentrated. In terms of equal sized competitors, this level falls between five and six. A market with six equal sized competitors would have an HHI of 1667. In such a market, the four firm concentration ratio would be 67. A market with five equal sized competitors would have an HHI of 2000. The four firm concentration ratio would be 80 percent.

Shepherd similar describes these thresholds in terms of four-firm concentration ratios as follows:[180]

EXHIBIT IV-1:

DESCRIBING MARKET CONCENTRATION FOR PURPOSES OF PUBLIC POLICY

DEPARTMENT OF JUSTICE MERGER GUIDELINES	TYPE OF MARKET	EQUIVALENTS IN TERMS OF EQUAL SIZED FIRMS	HHI	4-FIRM SHARE

$$CR = \sum_{i=1}^{m} S_i$$

m i = 1

where
n = the number of firms
m= the market share of the largest firms (4 for the 4 firm concentration ratio)
S_i = the share of the ith firm.

[180] Shepherd, p. 4.

	Monopoly	1 Firm with 65% or more	4200<	100
	Duopoly	2	5000<	100
		5	2000	80
HIGHLY CONCENTRATED	Tight Oligopoly		1800 OR MORE	
		6	1667	67
UNCONCENTRATED	Loose Oligopoly	10	1000	40
	Atomistic Competition	50	200	8

Sources: U.S. Department of Justice, *Horizontal Merger* Guidelines, revised April 8, 1997, for a discussion of the HHI thresholds; Shepherd, William, G., *The Economics of Industrial Organization* (Prentice Hall, Englewood Cliffs, N.J., 1985), for a discussion of 4 firm concentration ratios.

Tight Oligopoly: The leading four firms combined have 60-100 percent of the market; collusion among them is relatively easy.

Loose Oligopoly: The leading four firms, combined, have 40 percent or less of the market; collusion among them to fix prices is virtually impossible.

Shepherd refers to collusion, but that is not the only concern of is not the only concern of market power analysis, or the Merger Guidelines. The Merger Guidelines of the Department of Justice recognize that market power can be exercised with coordinated, or parallel activities and even unilateral actions.

> Market power to a seller is the ability profitably to maintain prices above competitive levels for a significant period of time.*/ In some circumstances, a sole seller (a "monopolist") of a product with no good substitutes can maintain a selling price that is above the level that would prevail if the market were competitive. Similarly, in some circumstances, where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist, by either explicitly or implicitly coordinating their actions. Circumstances also may permit a single firm, not a monopolist, to exercise market power through unilateral or non-coordinated conduct --conduct the success of which does not rely on the concurrence of other firms in the market or on coordinated responses by those firms. In any case, the result of the exercise of market power is a transfer of wealth from buyers to sellers or a misallocation of resources.
>
> */ Sellers with market power also may lessen competition on dimensions other than price, such as product quality, service or innovation.[181]

---

[181] Horizontal Merger Guidelines, at section 0.1. Lawrence Sullivan and Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook,* Hornbook Series (West Group, St. Paul, 2000), pp. 596-597, describe the DOJ approach as follows:

> The coordination that can produce adverse effects can be either tacit or express. And such coordination need not be unlawful in and of itself. According to the 1992 Guidelines, to coordinate successfully, firms must
>
> (1) reach terms of interaction that are profitable to the firms involved and
>
> (2) be able to detect and punish deviations. The conditions likely to facilitate these two elements are discussed separately, although they frequently overlap.
>
> In discussing how firms might reach terms for profitable coordination, the Guidelines avoid using the term "agreement," probably because no agreement or conspiracy within the meaning of Section 1 of the Sherman Act is necessary for the profitable interaction to occur. As examples of such profitable coordination, the Guidelines list "common price, fixed price differentials, stable market shares, or customer or territorial restrictions." Sometimes the facilitating device may be as simple as a tradition or convention in an industry.

There are three other types of markets that should be identified. Although ten firms constitutes an unconcentrated market, under certain circumstances even that number does not ensure vigorous competition. Generally, a much higher number, perhaps fifty, is associated with the concept of vigorous or atomistic competition.

On the other hand, there are two types of markets that are even more concentrated and therefore a source of additional concern. A duopoly is composed of two firms. Although the expression monopoly technically refers one and only one firm, antitrust practice refers to monopoly power when the market share of a firm rises to the level of 65 to 70 percent.

Because of the critical importance of the media not only an economic marketplace, but as the cornerstone of the marketplace of ideas, these industries should be held to close scrutiny. The critical level for scrutiny is the unconcentrated threshold (roughly the equivalent of 10 or more equal sized firms). The empirical data described in Exhibit IV-2 and the following data indicates that most of these market should be a source of concern.

C. ANALYSIS OF MEDIA MARKETS

1. THE INTERNET

The go on to not the mechanisms that might be used and the usefulness of the HHI index in this regard.

Oligopoly conditions may or may not require collusion that would independently violate Section 1 of the Sherman Act. A supracompetitive price level may be maintained through price leadership (usually the leader is the largest firm), through observance of a well-established trade rule (e.g., a convention of a 50 percent markup in price among competing retailers), or through strategic discipline of nonconforming members of the industry…

To the extent that one or very few members of a concentrated industry have much higher market shares than other members, the opportunities for strategic disciplining may expand… The expanded ability of the larger firm to coerce price discipline is reflected in the Herfindahl-Hirschman Index (HHI), which will assign a high concentration index to an industry with a very large participant. An industry with the same number of participants, each of them roughly equal in size, will have a lower index.

The Internet provides a most instructive starting point for the discussion, since, in theory, the number of Internet Service Providers is infinite, yet the market has become concentrated. TV networks and cable companies frequently argue that the number of outlets is all that matters, rather than the market share of the outlets. However, we believe this is the wrong approach since the distribution of attention is far more concentrated than the number of channels suggests.

For economic analysis eyeballs are what should be counted, not stations. In other markets the number of competitors is not the central issue, it is their market share that matters. Recently, Microsoft asserted that there were seven different operating systems in the marketplace with over twenty thousand applications available and at least three different computing environments (handhelds, PCs and the Internet), and therefore Microsoft could not possibly be a monopoly. Even a conservative appeals court resoundingly rejected that

EXHIBIT IV-2:

ORDER OF MAGNITUDE ESTIMATES OF
MASS MEDIA MARKET CONCENTRATION

MARKET AND PERIOD OF MARKET Of MOST RECENT DATA	LEVEL OF CONCENTRATION HHI	CATEGORY	TYPE OF
Internet (2000)			
Subscribers	2500	High	Tight Oligopoly
Viewing Time	1200	Moderate	Loose Oligopoly
Search Engines	1100	Moderate	Loose Oligopoly
Television (mid-1990s)			
(Local Viewing – Advertising)			
Largest Fifth	1600 – 700	Moderate – Low	Loose Oligopoly- Competitive
2nd Fifth	2000 – 1600	High – Moderate	Tight Oligopoly
3rd Fifth	2100 – 2300	High – High	Tight Oligopoly
4th Fifth	2700 – 2300	High – High	Tight Oligopoly
Smallest Fifth	2500 – 3100	High – High	Tight Oligopoly
National			
Viewing	1100	Moderate	Loose Oligopoly
Advertising	1700	High	Loose Oligopoly
Cable Subscribers (1999)			
Local subscribers	7000	High	Monopoly
FCC - MPVD			
w/o Attribution of AT&T	1000	Moderate	Loose oligopoly
w/ Attribution	1400	Moderate	Loose oligopoly
Cable only			
w/o Attribution of AT&T	1900	High	Tight Oligopoly
w/ Attribution	2500	High	Tight Oligopoly
Radio Local Share (1997)	1600 – 2100	Moderate - High	Tight Oligopoly
Newspapers Circulation (1999)	3000-6000	High	Duopoly

SOURCES AND NOTES: See next page

SOURCES AND NOTES:

Precise estimates of market concentration vary over time due to changing market shares. These order of magnitude estimates round the HHI to the nearest hundred to present

Internet: Jupiter Research, *Online Media Consolidation Offers No Argument for Media Deregulation*, 2001; Sheu, Tair-Rong and Kathleen Carley, "Monopoly Power on the Web – A Preliminary Investigation of Search Engines," *20th Telecommunications Policy Research Conference*, October 27, 2001.

Television: Cooper, Mark, based on Economists Incorporated, "An Economic Analysis of Broadcast Television National Ownership, Local Ownership, and Radio Cross-Ownership Rules," Before the Federal Communications Commission, *In Re: Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-122, May 17, 1995. These are consistent with the estimates for a couple of years earlier in Bates, Benjamin, "Concentration in Local Television Markets," *Journal of Media* (Fall) 1993, Table 1. Since the mid-1990s, larger markets have likely become more concentrated due to the relaxation of some ownership restrictions. Smaller markets may have become slightly less concentrated due to additions of stations, while ownership restriction remain in place.

Cable TV: Local market shares are assumed to be 1% for overbuilders, and 15 percent for satellite. National concentration is calculated by the author based on Federal Communications Commission, *Seventh Annual Report In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, January 8, 2001, Table C-3.

Radio: Berry, Steven T. and Joel Waldfogel, "Mergers, Station Entry, and Programming Variety in Radio Broadcasting," National Bureau of Economic Research, April 1999, Table 2. Ekelund, Robert B., Hr., George S. Ford, and Thomas Koutsky, "Market Power in Radio Markets: An Empirical Analysis of Local and National Concentration," *Journal of Law and Economics* (April) 2000, p. 170.

Newspapers: George Lisa and Joel Waldfogel, "Who Benefits Whom in Daily Newspaper Markets," *National Bureau of Economic Research*, October 2000, Table1, earlier estimates are somewhat higher, see Lacy, Stephen and Lucinda Davenport, "Daily Newspaper Market Structure, Concentration, and Competition," *The Journal of Media Economics*, 1993 (7), p.40.

argument.[182] Market structure analysis must be grounded on the actual market shares, not merely the number of participants and the rapidly increasing concentration of the Internet underscored that point. The increasing concentration of the Internet is stunning.

AOL's dominance of subscribership in the U.S. is widely noted (30 million subscribers, putting its market share above 50 percent). Its market share makes it a leading firm in a highly concentrated market.[183] Even more striking is the growth in the concentration of usage.

> Because the number of potential online channels is infinite, some assume that market dominance is an impossibility on the Internet. This is faulty reasoning. Gauging consolidation online simply requires a different measuring stick than it does off-line.
>
> Analysis of Media Metrix data over the past three years shows an incontrovertible trend toward online media consolidation…. Between March 1999 and March 2001, the total number of companies controlling 50 percent of user minutes online decreased by nearly two-thirds, from 11 to four.[184]

Because AOL has such a dominant position (over 30 percent of user time) the HHI is about 1200, well above the moderately concentrated threshold. The four firm concentration ratio also falls in the range where concerns about concentration and the abuse of market power begin.

Search engines fall in a similar range. The HHI is at about the level of moderately concentrated (1100). The four firm concentration ratio is at the tight oligopoly level, just under 60 percent.

2. NEWSPAPERS

[182] Cooper, Mark, N., "Antitrust as Consumer Protection in the New Economy: Lessons from the Microsoft Case," *Hasting Law Journal*, 2001 (April), reviews the evidence.

[183] A Leading or dominant firm proviso was included in the 1982 Merger Guidelines but was subsequently dropped. Shepherd talks about firms with a 50 percent or more market share as leading firm and a source of concern.

[184] Jupiter Research, *Online Media Consolidation Offers No Argument for Media Deregulation*, 2001.

As noted above, at the local market level daily newspaper markets have long been highly concentrated. Recent changes in ownership have driven HHIs to the 3000-6000 range.

There has also been a trend to creating large national trends. Thus, as noted above, the number of daily newspaper owners has declined even more sharply than the number of newspapers.

3. BROADCAST

Most local distribution markets for network TV are highly concentrated measured either in terms of viewers or advertising dollars. HHIs are well above 1800 and four firm concentration ratios are well above sixty percent in all but the very largest markets. The national market for viewers (HHI=1000) and advertising (HHI=1600) is moderately concentrated.

There has also been a trend to creating larger national networks (up to and above the cap). Thus, while the number of stations has been growing, the number of owners has been declining.

The recent wave of mergers has moved local radio markets into the highly concentrated range, with HHIs averaging about 2000. As with the other media, although the number of stations has been increasing, the number of owners has been declining.

4. CABLE

Although the FCC claims that the cable TV market falls just below the level of being moderately concentrated (HHI = 954), it arrives at this conclusion by ignoring AT&T's substantial ownership interests in Cablevision and AOL Time Warner and by including satellite in the same product space, even though it could not find significant cross-price elasticity between cable and satellite. Defining the market correctly as cable only and taking AT&T's ownership interests into account places the cable TV market into the highly concentrated category. As described earlier, the local level has an HHI of about 7000.

D. THE PROBLEM OF VERTICAL INTEGRATION AND CONGLOMERATION

We have found monopoly or near monopoly newspaper markets and highly concentrated broadcast markets. We have also found a lack of competition between the core businesses of these two media. Lifting the cross-ownership restriction would lead to vertical integration (integrating back office operations) or conglomeration (two different lines of business merging).

> A **horizontal** merger is a marriage of rivals. It involves firms doing "the same" thing in "the same" market…
>
> A **vertical** merger involv[es] companies in a supplier-customer relationship…
>
> **Conglomerate** mergers…: [are] **product-extension** mergers, in which the products (or activities) of the partners do not compete with each other but have some functional relationship in production or distribution.[185]

When mergers are vertical, there are particular concerns about the level of competition in each of the affected markets and the impact of the merger on competition across stages of production. It is notable that the vertical aspects of these types of mergers raise concerns. The most succinct statement from the general literature that captures the problems with such a merger is from William Shepherd who concludes that:

> Large costs could arise if the two merging firms are both heavily dominant at their levels, and capital barriers are high at one level.[186]
>
> The "ideal" conglomerate merger is by an unexpected entrant acquiring a minor firm. By contrast, if an important potential entrant buys up a dominant firm (or vice versa), competition will be doubly reduced.[187]

[185] Asch, Peter, *Industrial Organization and Antitrust Policy* (John Wiley and Sons, New York: 1983), p. 264 pp. 262-263.
[186] Shepherd, p. 292.
[187] Shepherd, p. 304.

Newspaper-broadcast mergers are the antithesis of "ideal." Exhibit IV-3 summarizes the anticompetitive conduct and negative market performance that can emerge from the weakened market structures that result from the particular type of concentration caused by theses mergers.

Vertical integration through merger can create barriers to entry. By integrating across stages of production, incumbents may force potential competitors to enter at both stages, making competition much less likely. These barriers take a variety of forms.[188]

A barrier to entry that receives considerable attention in the general literature is the need to raise large sums of capital for entry into vertically integrated industries. Backward integration by a dominant manufacturer may also create a barrier to entry so as to preserve its dominance.[189] Exclusive and preferential deals for the use of facilities and products can be anticompetitive.[190]

The market structural conditions that result from the concentration and integration of the industry make behavioral abuse effective. Cross subsidization becomes possible,[191]

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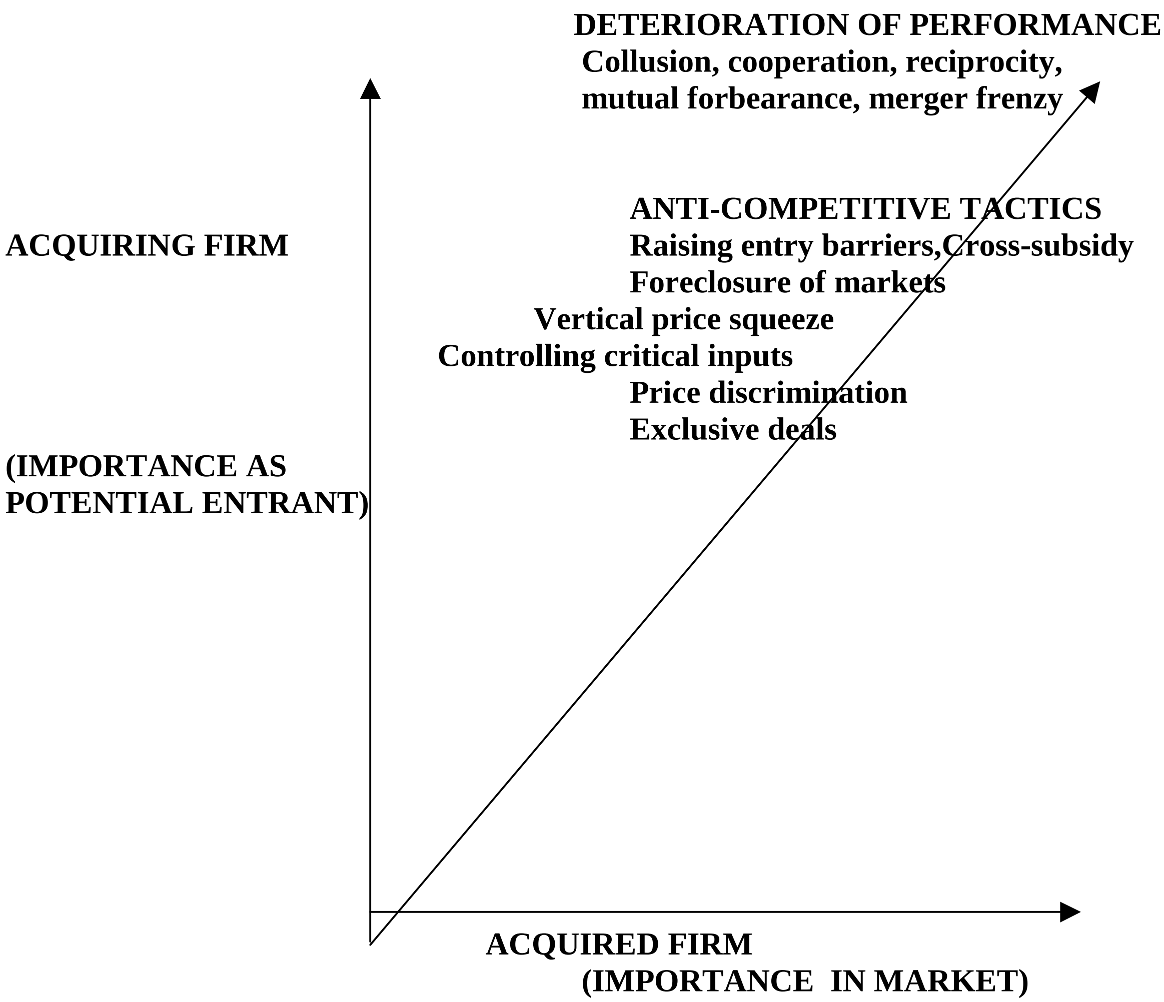
[188] Perry, Martin K., "Vertical Integration: Determinants and Effects," in Richard Schmalensee and Robert D. Willig (Eds), *Handbook of Industrial Organization* (North Holland, Amsterdam: 1989), p. 247.

[189] Shepherd, p. 290.

[190] Perry, p. 247.

[191] Asch, Peter and Rosalind Senaca, *Government and the Marketplace* (Dryden Press, Chicago: 1985), p. 248..

**EXHIBIT II-11:
THE SPECIAL PROBLEM OF CONGLOMERATES**



Shepherd, William G., The Economics of Industrial Organization (Prentice Hall, Englewood Cliffs, NJ, 1985), pp. 289-304.

although this is by no means the only available instrument of anti-competitive conduct. Vertical integration facilitates price squeezes and enhances price discrimination.[192]

Not only will the dominant firm in the industry gain the leverage to profitably engage in anti-competitive conduct, but also the dynamic processes in the industry will clearly shift toward cooperation and coordination rather than competition. The issue is not simply collusion, although that is a concern.[193] Beyond collusion, a mutual forbearance and reciprocity occurs as spheres of influence are recognized and honored between and among the small number of interrelated entities in the industry.[194] The final behavioral effect is to trigger a rush to integrate and concentrate. Being a small independent at any stage renders the company extremely vulnerable to a variety of attacks.[195]

These are the negative effects of the merger in strict economic terms. There are social and political concerns in the literature as well. Loss of local control is one concern. This would be a particularly strong concern in a media industry.

> There remain the social impacts of absentee ownership upon localities. Though they are less technically proven, they may ultimately be important.
> One impact occurs through plant closures decided by distant officials who are unaware or insensitive about local strengths …
> Local firms are normally knit into their communities, with the companies' officials contributing and participating in local affairs … When taken over by large firms, the local companies typically stop their local involvement. Indeed, there is often a shift toward pressuring the city for tax reductions and other favors.[196]

A second concern is the accumulation of political power. Again, given the fact that this industry involves the most important means of information discourse, this would be a particular concern.

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[192] Scherer and Ross, p. 524.
[193] Perry, p. 247.
[194] Asch and Senaca, p. 248.
[195] Scherer and Ross, pp. 526-527. Shepherd, p. 290.

> Large size can also yield political power, for two main reasons. First, large firms are a focus of large-scale financial resources, which can be quickly mobilized and deployed effectively. Second, their large employment rolls give them a direct influence over voting patterns.[197]

> Supporters of conglomerate size limitations frequently respond to such claims with a "noneconomic" argument … stating that the relevant issue for policy rests *not* in the "actual harms, however defined" that conglomerates create, but rather in "a *fundamental ideological concern* with giant aggregations of privately held assets."[198]

> The joining of significant numbers of large corporations may well affect power in a broad context -- visible perhaps in rising aggregate concentration measures -- even though the impacts on specific markets cannot be readily discerned. This result may give rise to social or political rather than economic concerns, but even economists will concede that such worries are real ones.[199]

In moderately or highly concentrated media and communications markets, vertical integration—the combined ownership of content and distribution channels—can skew incentives to undermine journalistic independence. For a news program at a station that is independently owned and operated, the overriding concern should be credible and professional reporting that will bring viewers back. However, when a large media conglomerate gobbles up that same station, it becomes unlikely that the station will cover its parent aggressively when inevitable conflicts of interest arise. In markets with few direct competitors, this bias is more likely to go unnoticed and unchallenged.

Even when it appears that the giants in one media sector are squaring off against the giants in another, each invoking the consumer's interest as its sole motivation in battle, often the consumer is more a hostage than the beneficiary of the warfare. For example, when ABC, backed by its parent, the Walt Disney Company (Disney), squared off against cable monopoly Time Warner over carriage terms for Disney's programming, consumers faced the following prospects: either Time Warner would win and consumers would still pay inflated cable rates without receiving Disney

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[196] Shepherd, p. 304.
[197] Shepherd, p. 298.

programming, or Disney would win, and Time Warner could increase consumers' rates in return for carrying Disney programming. And when cable and Internet giant AOL Time Warner sounds like it wants to challenge the national broadcast networks' dominance in TV news coverage through its popular CNN and Headline News cable channels, analysts believe this really means that AOL Time Warner wants to merge or partner with either ABC News or NBC News.[200]

The fundamental failure of media and communications policies to develop competitive transmission/distribution systems has left consumers at the mercy of powerful content and transmission companies whose most antagonistic, "competitive" behavior consists of fighting with each other over who gets the larger share of monopoly profits from consumers, and who often control content delivered to consumers.

V. CONCLUSION

For the above stated reasons, Consumers Union *et al.* respectfully urge the Commission to retain the Newspaper/Broadcast Cross Ownership rule in its current form.

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[198] Asch and Senaca, p. 249.
[199]Asch, p. 264
[200] Jim Rutenberg, "Mix, Patch, Promote and Lift." New York Times (July 15, 2001).

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December 3, 2001

APPENDIX A

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Cross-Ownership of Broadcast Stations and Newspaper	)	MM Docket No. 01-235
	)	
	)	
Newspaper/Radio Cross-Ownership Waiver Policy	)	MM Docket No. 96-197
	)	

STATEMENT OF Ben Bagdikian

My name in Ben Bagdikian. I am the former Dean of the Graduate School of Journalism at the University of California at Berkeley, and a former Assistant Managing Editor for National News at the Washington Post. I am the author of, among other titles, *The Information Machines* and *The Media Monopoly*.

I have reported on and followed broadcast policies and their impact on communities and the country at large for more than 50 years. During this period I have seen the Federal Communications Commission reverse its legal role of protecting the needs and desires of local communities through their radio and television stations, and increasingly provide the broadcasting industry the freedom and even given encouragement to ignore and counter local and national needs from its broadcast system. The proliferation of channels, far from increasing satisfaction of the expressed desires of local communities and national citizen groups like the Parent Teachers Association and educational authorities, has decreased this kind of requirement by licensees.

Some of these missing needs have, in the past to some extent, been filled by independent newspapers which serve as a respected, more detailed reporting medium to local broadcasting. But even this slight amelioration is now threatened by Commission action. Based on my extensive research, I conclude that if the Federal Communications Commission permits more common ownership of daily newspapers and local television stations in the same market it will be against the democratic needs of the American public. Newer media, like the Internet, do not even closely equal the amount of current daily news in newspapers and local TV on which a majority of Americans (80 percent) say they depend. (McCormick Tribune Foundation, "News in the Next Century.") Consolidating those sources will further exacerbate shrinkage of the voices that a majority of Americans still say they need and want. In most major markets, local newspapers regularly print critical reviews of local television station programs. The reverse is true in periodic broadcast station reporting and commenting on a newspaper in the same market under different ownership.

It has been the experience of many observers, including this writer's, that this cross-media mutual criticism and evaluation becomes minimal when both the local newspaper and a local broadcast station come under common ownership. In fact, a corollary effect is that far from offering mutual criticism, the two media under common ownership use this to have each of its properties, *i.e.*, the newspaper and the broadcast station, to become promotional media publicizing the other subsidiary, to the exclusion of similar positive notification of competing newspapers and/or broadcast stations.

Dramatic local events reported by both print and broadcast media, in the case of commonly owned newspapers and broadcast stations in the same market have noticeably had each of the commonly owned news media use facts and interpretations drawn from their corporate cousins. This reduces the diversity of information and commentaries that would occur if each had separate ownership.

Cross ownership of radio stations and newspapers, with its pressure to duplicate news rather then compete, has its analogy in the permission granted by Congress and the Commission to allow ever larger growth of concentration of ownership, notably in radio. The most noticeable impact has been the reduction of specifically local-oriented content, which requires a station to report events unique in its community, in favor of standard features duplicated in every station around the country in the radio groups' ownership.

My personal experience drives this point home in the most direct manner. I have appeared on a major radio network station in San Francisco and was instructed beforehand by the nationally known host, "Do not mention the date, the day of the week, or the weather, because this same program will be aired in all of our stations around the country and we want each city to think it is being locally originated."

The Commission has adopted a free market approach to allocation of licenses and content. This has meant not only the increased control by a few major groups with the resources to outbid strictly local groups, and this, in turn, contradicts the basic intent of Communications Law that mandates that each licensee is required to maintain a studio and accessible transmitter in each of its communities. Clearly, this requirement assumes that local studios would be more oriented to information and comment for that locality.

But under earlier rules and this proposed ruling, radio broadcasting in the United States is approaching a broadcasting configuration in which content would not be materially changed if each major group maintained a single station in a major city of the country, Washington, or

New York, for example, and broadcast a single program spread to other cities and towns by translators or satellite. This appears, at least to this observer, to contradict the basic philosophy of the country's Communications Law, which assumes, in its requirement of local studios, emphasis on local events and needs.

Evidence of the frustration of localities of increasingly common content in broadcasting was the emergence in recent years of a large number of illegal "pirate" radio stations operating without a license in order to fill the felt need in so many cities that the Commission's apparent preference for consolidation and concentration of ownership by nationwide conglomerates resulted in ignoring local needs.

Another manifestation of the Commission's apparent preference for meeting corporate ownership rather than local market needs is the past ruling permitting common content on commonly owned local AM and FM stations. As the Commission has evidence within its own files, after this decision, there was a dramatic rise of public complaints from listeners in those markets, citing a radical reduction in the number of stations emphasizing classical music, for example, or programs of special meaning to major ethnic and religious groups within those markets.

In many market the local television and radio stations air versions of public events that differ from that of those in the local daily paper and often add items not dealt with in the printed news. On the other hand, newspapers can develop stories in depth and do investigative reports, particularly where they have not come under the thumb of profit maximizing, cost cutting. Placing these diverse media under common ownership discourages this and predictably will homogenize the broadcast news and commentary within our cities.

Furthermore, there is no compelling financial need to consolidate ownership. In fact, there are positive reasons to keep the two local media financially independent of each other. Metropolitan daily papers, according to Standard & Poor's, average from 20 to 25 percent annual earnings (2), profit levels already well above the average for all United States industry.

The annual average profits for local television stations are even higher, ranging from 30 to 60 percent (3). Bringing two of the most profitable news operations in American industry under common ownership will enlarge the already measurable shrinkage of quality and diverse news that has occurred under the pressure of Wall Street to force both news media to increase profits further by cutting costs. In a news operation, cutting costs has almost always meant reducing the amount and depth of news and of reducing news staffs. Here, again, the public interest is not served.

The extraordinary growth of media concentration in the last 20 years has resulted in a half dozen conglomerates with controlling interests in all the mass media, including newspapers and broadcasting. The size of these media corporations, some of them subsidiaries of even larger conglomerates (like General Electric's ownership of NBC) has made them increasingly subject to the demands of Wall Street for even higher profits than their positions as already among the most profitable of United states industries.

Quite aside from the obvious issue of concentrated control in major news media, the common ownership of newspapers and broadcast stations, with rare exceptions, has produced large firms whose content is influenced more by the advantages to holders of stock options than by the needs of the audience. Common ownership of the two media will exacerbate this tendency that comes from enlarge corporate size and influence within a market.

These demands on the news media for higher stock prices has caused significant turmoil in the traditional attempt to keep news accounts as distant as possible from the day-to-day influence of the business operations of the medium. It is a matter of record, for example, that shortly after General Electric acquired NBC, the then chief of GE, Jack Welch, called his president of the NBC news decision and expressed the desire that in that day's slump in the stock market, NBC news would not broadcast anything that might depress the level of GE stock prices. (4).

A dramatic example of deterioration of news standards created by a desire to keep major corporate stock prices at a rising curve involved one of the most prestigious daily papers in the country, The Los Angeles Times. When a new publisher was appointed, he said he would improve the paper's position in the marketplace by altering the leadership of all departments, including the news. The news thereafter would be selected not by an editor alone but by co-editors, one a journalist, the other a representative of the paper's business department. There followed thereafter a violation on a long-standing rule in journalism that the news should not be used to favor major advertisers in the paper. The Los Angeles Times issued an editorially-produced copy of its Sunday Magazine in a partnership with a major advertiser. The shock in the paper's newsroom led to the departure of important journalist, the paper's circulation did not increase but its stock price rose markedly.

It appears that this emboldened many newspapers to disclose that they, too, had permitted advertising to influence their news in order to increase profits. Parent firms of newspapers increasingly told executive editors and publishers that they would be required to use their news to help- meet heightened profit levels. The details of one case became public when the publisher of the well-regarded San Jose (California) Mercury-News, Jay

Harris, resigned and made clear that he left because top executives of the parent firm, Knight-Ridder order such high profit levels that it would, in his opinion, seriously damage the news received by the public.

Thus, there is ample evidence that policies that increase size and influence of news media, especially in the case of newspaper and broadcast outlets, has a history of decreasing the quality of public service, which in turn is contrary to the intent and language of the Communications Law.

(1) San Francisco Chronicle, 8 July 1999, B-1.
(2) Standard & Poor's Industrial Survey, Broadcasting and Cable, 2 July 1998; and New York Times, 8 June 1999, C-10.
(3) The New Yorker, 9 November 1998, 34
(4) The New York Times, 10 December, 1986.1.
(5) Columbia Journalism Review, March/April 1998, 54.
(6) Public speech by the publisher, Jay Harris, before the annual convention of the American Society of Newspaper Publishers, April 6, 2001.

APPENDIX B

Who Benefits Whom in Local Television Markets?

Joel Waldfogel
The Wharton School
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and NBER

November 15, 2001

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When production carries substantial fixed costs, it is well known that larger markets can offer more, and more varied, products. Ensuing broader product options increase consumer welfare by offering more types of consumers options they prefer; and product variety draws a higher fraction of residents to consumption. In this sense people can benefit each other in their capacity as fellow product consumers. But who benefits whom? You will benefit me only to the extent that you bring forth products that appeal to me which, in turn, will occur only if we share similar preferences.

Blacks and whites (and Hispanics and non-Hispanics) have substantially different preference in media products. The radio formats attracting two thirds of black listeners collectively attract less than 5 percent of white listening (Waldfogel, 1999; Siegelman and Waldfogel, 2001). In markets with multiple daily papers, blacks' readership tends to be heavily concentrated in only one paper (George and Waldfogel, 2000). Local markets with larger black populations have more black-targeted radio stations and daily papers that cater more to black consumers' tastes. Moreover, blacks are more likely to consume local radio and daily newspaper products in markets with more heavily black populations. As a consequence, blacks and whites are better off, in their capacity as local media consumers, as their markets have larger black and white populations, respectively.

The scope for tyrannies of the majority to operate in markets is larger, the higher are fixed costs relative to market size. This is why black and white consumers affect each other more in daily newspaper markets, with only a handful of products per market, than in local radio markets, averaging 25 stations per market.

Unlike daily papers and radio, which are predominantly local media, television is a mixed local/national medium. Most programming, including network prime time and almost all cable channels, is uniform across place. However, outside of prime time, local broadcast stations, including both independent stations and affiliates of networks (such as ABC, CBS, or Fox) determine much of their programming locally. The latter set of programming decisions allow a mechanism for television consumers to affect their fellow local residents. Yet, given widespread availability of a large number of specialized national cable (and satellite) channels, it is not clear whether local viewers' welfare depends on local programming decisions. Rather, specialized national channels may satisfy diverse tastes, leaving little scope for local programming decisions to incrementally affect welfare. Distributional effects in television, which is perhaps the most influential news, information, and entertainment medium in the US, remain to be studied. Americans spend on average more time with television than with other media, and a much higher fraction of households watch television than read local newspapers.

This paper examines the effects of the size and racial composition of local populations on the types of local programming offered, as well as on the welfare of various types of television viewers. We proceed in three sections. First, we provide some theoretical background, along with a description of the relevant literature. Second, we describe the data used in the study. We then turn to results. We find that, as in other media, television programming preferences differ sharply between blacks and non-blacks, and between Hispanics and non-Hispanics. We show that the targeting of local programming to minority viewers is much greater in markets with larger minority populations, whereas prime time and national cable programming are, by definition, insensitive to local preference distributions. We document that the quantity of locally controlled minority-targeted television draws minority viewers to viewing. Together, these relationships imply that blacks and Hispanics are better off, in their capacity as television viewers, in markets with larger black and Hispanic populations.

In local media markets, the welfare of consumers in each preference group depends on the distribution of product-preferring types in the market. This is interesting both by itself and also because it casts doubt on the prevailing belief in a clear distinction between market and collective choice allocation schemes. Friedman (1962) has eloquently argued that markets avoid the tyrannies of the majority endemic to allocation through collective choice. Mounting evidence that minority consumer welfare depends on local minority population in local media markets indicates that, for this industry at least, the difference between market and collective choice allocation is a matter of degree, not kind. It is important to understand the relationship between market demographic composition and the targeting of programming content because related research documents a relationship between the presence of black-targeted media and the tendency for blacks to vote (see Oberholzer-Gee and Waldfogel, 2001).

I. Background: Population Composition and Groups' Welfare from Television

Which products do markets bring forth in contexts where products are imperfect substitutes and each product carries some fixed costs? This is a difficult question to answer in general. Dixit and Stiglitz (1977) present a model in which products are symmetrically substitutable, reducing the problem to "how many products." Their model allows them to examine whether markets bring forth adequate or excessive variety; but their treatment of substitution abstracts away most important features of firms' decisions (as well as the preference landscape of a heterogeneous society). Spence (1976a,b) lays out the "product selection" problem, pointing out the distinction between market and optimal mixes of products are made available. As a positive matter, it is not clear what determines the mix of products available in differentiated product contexts with fixed costs, and this line of research, documenting the determinants of product mixes, is an attempt to fill that void.

The product selection problem in this context has two parts. First, the market must determine how much programming to air, i.e. how many local broadcast stations will operate in a market, and how many channels of cable programming local cable operators will carry. Because local broadcast facilities have fixed costs, larger markets will support more of them. This is the familiar relationship between market size and firms/products from the entry literature. See Bresnahan and Reiss (1990, 1991) for general studies of entry and Berry and Waldfogel (1999) for a (radio) broadcasting example.

The second part of the problem is the mix of programming to air. The general economic problem facing a station is, what program to air in each of the time slots it controls. At least three features of the firm's environment affect its decision-making. First, the program preferences of the station's potential audience affect the desirability of airing particular programs. Second, the audience appeal of a program in a time slot depends on the programs simultaneously aired by competing outlets. Third, program choice might be influenced by a "carryover effect," or tendency for viewers to continue watching a station during consecutive time slots. One can imagine a formal problem in which each firm's profits depend on its programming choices, as well as its competitors' choices. Finding an equilibrium for such a context is a dauntingly complex prospect. Goettler and Shachar (2001) have made strides in this direction. While we recognize the richness of firm decision-making determining the mix of programming aired, ours is the more modest goal of describing how the available mix relates to the distribution of persons, by preference type, in the population.

Even in our descriptive characterization, the mechanism by which "product selection" affects welfare is different in television, radio, and newspapers, and the way we view the product affects how we view its determinants. In radio, each station typically chooses which one of roughly 50 formats to broadcast, then broadcasts it all the time.[1] Markets of different size have different numbers of radio stations on the dial. Hence, the quantity of programming targeting any particular group depends on the absolute size of the targeted group locally. For example, the *absolute size* of the local black population is a useful variable for explaining the quantity of black-targeted radio programming available. Unlike in the case of radio, larger markets do not have many more newspapers. Rather, they have larger newspapers. Further, newspapers contain scores of articles each day and arguably a more complicated product than radio stations. It is helpful simplification to imagine that newspapers choose a point along a one-dimensional white-to-black-targeted spectrum. In the case of daily newspapers, it is more fruitful to examine the relationship between the *fraction* black in the market and the appeal of the one or few products to black consumers. See George and Waldfogel (2000) for evidence on this point.

The television problem is something of a hybrid between the radio (*"how many stations?"*) and newspaper (*"what mix of content?"*) examples. Larger markets have more local television stations, and this is true even across the 66 large US markets in our sample. Although all of the markets have ABC, CBS, NBC, Fox, and PBS affiliates, only 60 have WB, and 56 have UPN, affiliates. Affiliates of Hispanic-targeted Telemundo and Univision are even rarer, with 15 and 23 of 66 sample markets covered. Thus, some variation in the amount of content targeting various groups is driven by factors determining the total amount of programming available in the market. Beyond that, there is also substantial variation in the *fraction* targeted to each group. In the empirical descriptions of program targeting that follow we allow the local quantity of minority-targeted programming to depend on both the local fraction black (or Hispanic), as well as the absolute population sizes.

Programming decisions can affect viewer welfare by allowing them access to more preferred programming options. For example, if black and white content preferences are different, then black viewers will derive more satisfaction in markets with more black-targeted programming. Although we cannot observe satisfaction, we can draw inferences about satisfaction from the tendency to watch television. This is the path we pursue below.

II. Data

Data for this study are drawn from two sources, Scarborough Research and the Census. The Scarborough Prime Next dataset has information on the media and product consumption patterns for each of roughly180,000 individuals surveyed in the latter half of 1999 and the first half of 2000 in 66 large US markets (see http://www.scarborough.com/primenext/). Of particular interest to us are the following

[1] See Waldfogel (1999) for lists of radio broadcast formats.

variables: race, Hispanic status, and detailed television viewing data, particularly for broadcast television. Respondents are asked to report all of the television half hours (between 6AM and 1AM) they watch during a 7-day period on affiliates of each of the following 10 networks: ABC, CBS, FOX, NBC, PAX, PBS, TEL, UNI, UPN, and WB, as well as on independent stations (IND). We refer to this viewing as the "network affiliate viewing." Cable information is more rudimentary in this version of the Scarborough data. Survey respondents indicate dichotomously whether they regularly watch each of about 70 cable channels.

With 38 half hours in a day, seven days in a week, and eleven channel choices, there are 2926 individual program viewing variables, each of which represents a particular product choice. Our ultimate interest is in the relationship between viewers' satisfaction and the local population distribution, as determined by the availability of suitable programs. Because there is no scope, by construction, for prime time viewer satisfaction to depend on the local distribution of types, it is important for us to disaggregate our viewing measure into separate prime time and locally controlled measures.[2] Our basic measure of television viewing is the number of program half hours that a person reports having watched. The average sample person watches 11.0 evening prime time half hours per week and 24.5 other (largely locally controlled) half hours, for a total of 35.5 half hours per week. Table 1 shows how total viewing (of the networks for which detailed viewing data are available) is distributed across networks for each group.

[2] In Eastern and Pacific time zones, prime time runs from 8PM-11PM Monday-Saturday and 7PM-11PM on Sunday. Prime time begins and ends one hour earlier in Central and Mountain time zones. We treat this as prime time for all networks, even though not all networks air national programming during the same hours.

ABC, CBS, and NBC attract the largest viewership for all groups, except Hispanics, for whom Univision is the largest draw.

Using the network viewing data we can create measures of channel availability, as well as measures of the quantity of black- or Hispanic-targeted programming on the air in each market. We calculate the number of broadcast stations in each market as the number of the eleven local channel types (ten network plus independent) receiving viewers in each market. Our markets range between 6 and 11 local broadcast stations by this measure and the markets average 8.8.[3] We calculate the number of cable channels similarly. Our markets average 48.8 cable stations, and range between 45 and 57 across sample markets.

We calculate the numbers of black- and Hispanic-targeted shows as follows. We deem a show black targeted, for example, if more than 90 (or 75, etc.) percent of its local audience is black. The quantity of black-targeted programming in a locale is simply the number of shows that we so deem black-targeted. This measure is affected by the composition of local population. For example, if a locale were 100 percent black, then all shows attracting viewers would appear to be black-targeted. Because prime time is targeted the same way everywhere, we can use differences in this measure's quantity of black-targeted programming in prime time across locales to normalize our measure of the quantity of black-targeted local programming. We return to the ensuing measures below.

III. Results

1. Do Program Preferences Differ by Group?

Research on other media indicates that programming preferences in radio and newspapers differ sharply by race and Hispanic status (Waldfogel, 1999; George and Waldfogel, 2000). Journalistic evidence suggests that these differences extend to television (Sterngold, 1998). The Scarborough data allow direct testing of how television preferences differ by race.

Our strategy for investigating whether television program preferences differ by group is to examine whether blacks, whites, and Hispanics, when faced with multiple options, choose differently. The wider the range of options facing viewers, the more we can learn about the extent of preference differences. That is, if there were only three similar viewing options at a point in time (such as prime time network television in the 1960s), we might not see much difference in the tendency to view different types of programming. On the other hand, if groups with different preferences face a large number of options, including some apparently targeted at black or Hispanic viewers, we can see the extent of preference differences.

Our data give us essentially three separate "experiments" for testing how much preferences differ across viewers. First, viewers in all markets face the same prime time national programming options. Second, viewers in all markets face similar sets of national cable options. Finally, *within* each market, viewers face the range of locally controlled programs. We make use of each of these in turn.

Table 2 shows the percent of blacks and Hispanics (and non-blacks and non-Hispanics) watching television between 8 and 11PM (eastern time) on Thursday evenings during the 1999-2000 television season on six major national networks. For example,

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[3] This measure of local broadcast stations slightly understates the true number because it allows for only one independent station. However, calculations using more comprehensive BIA data confirm that the

2.5 percent of black persons watched ABC from 8-8:30PM, compared with 4.2 percent of non-blacks. During the same time slot, 4.7 percent of black households watched UPN, while only 1.6 percent of non-blacks watched UPN. That is, blacks have roughly three times the tendency to watch that (and other UPN shows), compared to non-blacks. Similarly, Hispanics have roughly double the tendency to watch UPN shows relative to non-Hispanics.

Table 3 displays the data differently, to show the percent of Thursday prime time audiences that are black and Hispanic. Given that blacks and Hispanics each make up small fractions of the US population, their greater tendencies to watch particular programs are not high enough to make them large shares of national shows' audiences. For example, the audience for the UPN 8-8:30 PM time slot, which blacks are three times as likely as whites to watch, was only 26.7 black. The audience for the ABC 8-8:30 PM time slot was only 6.8 percent black, by contrast.

On Thursdays, NBC had the whitest audiences (roughly 94 percent non-black), followed closely by ABC (roughly 93 percent), CBS (about 90 percent non-black), and FOX (85 percent non-black). The UPN and WB network shows have the least white audiences, at 75-80 percent non-black. The patterns for Hispanics are similar, with FOX, WB, and UPN attracting the most Hispanic audiences, although those audiences are less Hispanic than they are black.

While the network prime time data indicate that different groups tend to choose different programming, the range of choices on the national networks may not be broad enough to reveal the extent of differences in preferences. The data contain information about whether sample persons regularly watch each of 70 cable networks, presumably

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positive relationship between market size and local broadcast stations.

including a broader range of variation than on prime time in the broadcast networks. Table 4 display the tendencies to watch (the percent of the sample regularly watching the cable channel) and distributions of audiences, by race and Hispanic status.

Blacks make up 11.1 percent of the sample but 60.8 percent of the persons regularly watching BET (Black Entertainment Television). The networks with the next-highest black audience shares are premium movie channels: Showtime (22.0), Cinemax (19.7), HBO (18.4), and The Movie Channel (18.1). That is, BET is the only black-targeted cable network, and as table 4 shows, 41.8 percent of black persons regularly watch it, compared with 3.2 percent of whites.

The cable data are somewhat misleading for Hispanics because two Spanish-language networks (Univision and Telemundo) appear in the network data. Both have overwhelmingly Hispanic audiences. The Hispanic tendencies to watch TEL and UNI are 15.1 and 31.4 percent, respectively. TEL and UNI audiences are 90.1 and 91.5 percent Hispanic, respectively. At least two additional cable networks are Hispanic targeted. For example, Fox Sports Español and Galavision have substantial audiences that are over half Hispanic.

Locally controlled television programming provides a third avenue of insight into how preferences differ across consumers. The 66 locales in our data vary between 0.9 and 40.5 percent black and between 0.4 and 47.4 percent Hispanic. We can calculate the fraction of the audience of each affiliate's half hour time slot that is black. Table 5 describes these data. The top row indicates that ABC affiliates air an average of 10.27 (1.97) non-prime-time half hours with audiences at least 50 (90) percent black. By all of our metrics, UPN, WB, and Fox air the largest numbers of black-targeted half hours among the 10 covered networks. For example WB affiliates average 15.43 half hours with audiences over 90 percent black. One market has 88 WB half hours outside evening prime time with such overwhelmingly black audiences.

The second half of the table does the same exercise for prime time shows. These shows are, by construction, not locally controlled nor are they extremely black-targeted. That prime time shows appear black-targeted in some markets and not others is an artifact of different fractions black in the various markets' populations. Indeed, this is a potential shortcoming of our measure. However, the absolute size of the problem is small: on UPN and WB affiliates, we deem roughly 10-15 percent as many evening prime time shows black as we deem locally controlled slots black-targeted. That is, the vast majority of the variation in the number of black-targeted local shows in our measure is real, not an artifact of the way we create the measure.

Table 6 does the same exercise for Hispanic-targeted shows. With the important exception of Univision and Telemundo affiliates, network affiliates carry relatively few Hispanic-targeted shows

The estimates in tables 5 and 6 indicate that local markets have substantial numbers of shows with overwhelmingly minority audiences. Whereas prime time programming attracts, at most, national audiences that are about a third black, much local programming is clearly aimed at blacks. The eleven networks air 2926 sample half hours per week. An average sample member lives in a market with 57 shows that have over 90 percent black local audiences and 197 shows with majority-black local audiences.

The local data indicate, to a greater extent than the national prime time or cable data, both the distance between black and white preferences and the fact that local programming, far more than national programming, caters to those preferences.[4]

2. Does the Mix of Programming Vary with Local Audience Composition?

It is clear from the results above on group preferences that locally controlled programming varies more than nationally controlled programming in the extent of its black targeting. Hence the wider dispersion in the minority content of audiences. In this section we ask whether the amount of black-targeted local programming varies across place with the demographic composition.

The quantity of black- and Hispanic-targeted programming available in each locale depends on both the total amount of programming and the fraction that is group-targeted. We begin by characterizing the relationship between the total quantity of available programming and market size. Table 7 reports results of regressions of the numbers of broadcast, cable, and total (broadcast + cable) on market population, in levels and logs. The results confirm what intuition would suggest: larger markets have more programming options.

The relationships themselves bear some discussion. Across these large markets (ranging in size from 243,000 to 18 million) there is proportionally more variation in local broadcast facilities than in cable stations. This presumably reflects the real fixed costs of adding another broadcast facility. Almost exclusively, the cable stations are national, while the broadcast affiliates have some locally originating and/or locally

[4] It remains to be seen whether particular half hours on national cable networks appeal particularly to black audiences.

controlled programming. Thus the amount of "local" programming is fairly sensitive to the size of the local market, while the amount of nonlocal programming is less sensitive, especially proportionally.

We can also use the station-level data to ask whether targeted presence varies with group population. While there are no wholly black-targeted networks, WB and UPN carry substantial amounts of black-targeted programming. Univision and Telemundo are Hispanic targeted. Table 8 reports probit estimates of the presence of these group-targeted affiliates on group sizes. The Spanish-language stations are much more likely to be present as markets have larger Hispanic populations. WB and UPN are driven more by overall market size. Particularly for Hispanics, then, there will be more group-targeted programming because there are more Spanish-language stations.

We now turn to the analysis at the level of the program, rather than the station. We have documented above that the total quantity of programming depends on market size, so we allow the quantity of black-targeted programming, for example, to depend both on the absolute size of local black population and the share of local population that is black. Because four commercial networks are ubiquitous in our sample, we can perform scale-independent analyses of the quantities of group-targeted programming aired on these affiliates. For these analyses, we expect only the shares to matter.

Figures 1 (and 2) show the relationships between the percent of local population that is black (or Hispanic) and the number of half-hours with local audiences in excess of 90 percent black (Hispanic). Each figure shows prime time shows as well as non-prime time. Because the amount of prime time programming targeting minorities cannot vary across place by construction, we include this to show that the local programming-local population composition relationship is not an artifact of the way we calculate the measure.

The figures both show striking positive relationships: locales with higher fractions black or Hispanic have substantially more black or Hispanic-targeted programming outside of prime time (on the 11 networks). Memphis and New Orleans, for example, with black populations over a third of their totals, each air over 200 local half hours with audiences at least 90 percent black. Similarly, San Antonio, nearly half Hispanic, has about 400 local half hour shows with audiences at least 90 percent black. Both of these relationships run through the origin; that is, markets with no blacks or Hispanics have no black or Hispanic-targeted programming.

Table 9 documents the responsiveness of local program targeting to black and Hispanic population share, respectively, overall and for the four ubiquitous networks. The top panel shows results for blacks. The quantity of non-prime-time black-targeted programming on network affiliates is larger in markets with higher black concentration. Column (2) shows that the relationship, though smaller in magnitude, holds for the four ubiquitous networks, as well as overall. That is, at least part of the effect is pure postioning. Columns (3) and (4) show the quantity of black-targeted programming is not sensitive to the absolute size of black population (after controlling for the black share of population). Hence, the quantity of black-targeted programming appears to be determined primarily through positioning rather than entry, at least across these large markets.

Results for Hispanics are somewhat different than results for blacks. Here, as column (3) shows, the absolute size of the Hispanic population matters, confirming the table 8 finding that the number of Hispanic targeted broadcast affiliates depends on Hispanic market size. Differences in the quantity of Hispanic-targeted programming across markets are driven by entry as well as positioning.

3. Do Viewers Value Group-Targeted Programming?

There is more minority-targeted programming in places with larger minority shares (and populations for Hispanics), but the question for welfare is whether the greater quantity of programming brings additional benefits to the target audiences. In one sense, this is obvious. We have already documented that, when confronted by variation in programming, different groups choose different options. Still, if broader options benefit people, we should see a greater tendency for people to view options targeted at them.

Table 10 examines the relationship between the black and Hispanic tendencies to watch network and network affiliate television the numbers of group-targeted local half hours. Columns (1)-(3) examine blacks and columns (4)-(6) examine Hispanics. The first (fourth) column employs an OLS specification. In the second (fifth) column, the local programming variable is instrumented with the share of local population that is black (Hispanic). The third (sixth) column employs market fixed effects. Thus, the effect of black programming on the black viewing tendency is identified as the relationship between the extent of black local programming and the gap between the black and white viewing tendencies. In all of the specifications, blacks view more television in places with more black-targeted programming. The pattern for Hispanics is similar, although the IV estimate (column 5) is not significant.

4. The Bottom Line: Preference Externalities in Local Television Programming

Blacks and whites, and Hispanics and non-Hispanics, prefer different television programming. Markets with higher minority shares have larger amounts of minority-targeted programming. Minorities derive more satisfaction from television – inferred from their greater tendency to watch – in markets with more minority-targeted programming. Hence, one can infer that raising the black or Hispanic share of local population will raise the welfare of local blacks, in their capacity as local television consumers. In this section we examine this relationship directly.

Broadly, there are two ways of examining the relationship between population composition and welfare (as implied by viewing). First, we can examine the relationships between each group's viewing and population composition. We term this the "simple cross section approach." Thus, for example, we can examine the cross-market relationship between black viewing and the share of local population that is black. A possible shortcoming of that approach is that some unobserved characteristic of the market may be correlated with both the population composition and the tendency for persons to watch television.[5] Because we have data on both black and non-black tendencies to watch television, we can circumvent this problem by pooling black and non-black observations together and including market fixed effects in the regressions. In this "MSA fixed effects" approach, the effect of, say, the percent black on the tendency for blacks to watch television is identified from the relationship between the percent black and the gap between black and nonblack television viewing.

[5] An illustrative, although not necessarily plausible, example is weather. If blacks are concentrated in some regions with different weather, and if the nature of the weather affects the appeal of being indoors (and therefore watching television), then the fraction black and the tendency for blacks to watch television will be related for reasons unrelated to the mechanism outlined in the paper.

First we examine the simple cross section approach. Table 11 reports regressions of black and non-black viewing on a) black and non-black population, and b) the black population share. We separately estimate these models on prime time and local viewing hours. For example, columns (1) and (2) show that black viewing outside of prime time increases in the local black population and decreases in the local non-black population. Non-black viewing does not vary with black and non-black populations. Columns (3) and (4) re-examine these relationships during prime time hours. Black prime time viewing increases in local black population, but the size of the effect is less than a quarter of the size of the local effect.

The latter half of the table is estimated with the black population share. Black viewing increases with the share black. Isolated blacks watch roughly 20 half hours outside of prime time per week. Blacks in markets that are, say, 50 percent black watch roughly 28 half hours. White viewing is invariant with respect to the local fraction black.[6]

Table 12 revisits the question using the simple cross section approach for Hispanics. Here the relationships are insignificant. That is, there is no evidence that Hispanics are better off, as television viewers, in markets with absolutely or proportionately more Hispanic residents.

Table 13 examines both blacks (relative to nonblacks) and Hispanics (relative to non-Hispanics) using the MSA fixed effects approach. Each of the regressions includes group-specific age and gender dummies, as well as MSA fixed effects. These results confirm that blacks benefit blacks (relative to their effect on whites). Moreover, Hispanics benefit Hispanics (relative to their effects on non-Hispanics) in these specifications. Effects are larger for blacks than for Hispanics.

As in other media, the welfare of minority television viewers with distinct preferences depends on their neighbors. The presence of a substantial variety of cable channels makes this dependence of local residents welfare on their neighbors surprising. If cable did not exist, one might expect stronger dependence on minority viewers' welfare on their neighbors' preferences. While we cannot examine a world without cable, we can ask whether this dependence is stronger for viewers without cable. We explored this possibility and found no stronger dependence of group viewing on population composition among those without cable connections. Of course, given the endogeneity of cable connection, it is not entirely clear what one might make of such regressions in any event.

Conclusion

A growing body of evidence shows that, when preferences differ across audience groups, the satisfaction of local media consumers depends on the size their groups' local populations. This relationship has been documented in prior research for local radio and daily newspaper markets. The present study documents that this relationship holds, particularly for blacks, in local television markets as well. In particular, we document:

1) that television programming preferences differ sharply between blacks and non-blacks, and between Hispanics and non-Hispanics;

[6] Recall from figure 1 that the market with the most black-targeted local programming (New Orleans) had about 235 half hours per week, out of a total of nearly 3000. Although whites face fewer white-targeted

2) the quantity of group-targeted programming is larger in markets with more minorities (proportionately more for blacks, absolutely and proportionately more for Hispanics);

3) minority viewing of network affiliates increases in their quantity of minority-targeted programming; and

4) minority viewing (and, one can infer, viewer welfare) depends on the distribution of one's neighbors' tastes.

These results have both practical and theoretical interest. First, the theoretical: in this context, with large fixed costs and preferences that differ sharply across groups of consumers, consumer satisfaction depends on the distribution of program-preferring types in the local market. Here, as in other local broadcasting contexts, the dichotomy between market and collective choice allocation suggested by Friedman (1962) does not hold. Second, the practical: despite the large number of national cable channels widely available in the 66 large markets examined in this study, local television exerts an effect on local viewers' welfare. Policymakers might bear this in mind as they consider rules that advantage national broadcast programming at the expense of local programming.

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segments in heavily black markets, they nonetheless face a large amount of white-targeted programming.

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Table 1:
Weekly Half-Hours Viewed by Race and Hispanic Status

Network	Markets With Affiliate	Non-Black	Black	Non-Hispanic	Hispanic
ABC	66	8.40	8.71	8.70	6.57
CBS	66	8.97	10.43	9.43	7.52
FOX	66	3.58	4.88	3.82	3.62
IND	41	0.74	1.20	0.79	0.75
NBC	66	8.51	8.41	8.72	6.89
PAX	56	0.51	0.66	0.54	0.51
PBS	66	1.42	1.13	1.42	1.17
TELEMUNDO	15	0.59	0.53	0.06	2.39
UNIVISION	23	2.12	2.37	0.15	10.11
UPN	56	1.18	2.89	1.43	1.50
WB	60	1.22	2.56	1.40	1.49

Table 2:
Tendency to View Thursday Prime Time Shows, by Group
1999-2000 Season

	Blacks					
	abc	cbs	fox	nbc	upn	wbx
8-8:30PM	2.5%	5.8%	2.5%	5.1%	4.7%	2.0%
8:30-9PM	2.8%	5.4%	2.7%	3.1%	4.7%	2.0%
9-9:30PM	4.7%	4.3%	2.8%	4.6%	4.7%	3.2%
9:30-10PM	4.8%	4.2%	2.8%	3.1%	4.6%	3.2%
10-10:30PM	3.3%	3.6%	4.6%	7.8%	2.8%	2.3%
10:30-11PM	3.3%	3.5%	4.1%	7.6%	2.2%	2.1%
	Non-Blacks					
	abc	cbs	fox	nbc	upn	wbx
8-8:30PM	4.2%	6.3%	1.8%	10.4%	1.6%	0.7%
8:30-9PM	5.1%	6.1%	1.9%	6.3%	1.7%	0.8%
9-9:30PM	8.9%	4.6%	1.8%	9.0%	1.7%	1.7%
9:30-10PM	9.2%	4.6%	1.8%	5.5%	1.7%	1.7%
10-10:30PM	4.5%	4.1%	3.5%	11.5%	1.1%	1.2%
10:30-11PM	4.3%	4.0%	2.9%	11.2%	0.9%	1.0%
	Hispanics					
	abc	cbs	fox	nbc	upn	wbx
8-8:30PM	2.2%	2.9%	1.5%	8.0%	3.2%	1.2%
8:30-9PM	2.8%	2.6%	1.7%	4.8%	3.2%	1.2%
9-9:30PM	4.5%	2.1%	1.6%	5.5%	3.2%	2.7%
9:30-10PM	4.5%	2.0%	1.6%	3.6%	3.3%	2.8%
10-10:30PM	2.4%	2.2%	3.0%	7.1%	1.6%	1.6%
10:30-11PM	2.3%	2.2%	2.7%	6.8%	1.2%	1.2%
	Non-Hispanics					
	abc	cbs	fox	nbc	upn	wbx
8-8:30PM	4.2%	6.6%	1.9%	10.0%	1.8%	0.8%
8:30-9PM	5.1%	6.4%	2.1%	6.1%	1.9%	0.9%
9-9:30PM	8.9%	4.8%	1.9%	8.9%	1.9%	1.7%
9:30-10PM	9.2%	4.8%	1.9%	5.4%	1.9%	1.8%
10-10:30PM	4.6%	4.2%	3.6%	11.5%	1.3%	1.3%
10:30-11PM	4.4%	4.1%	3.0%	11.2%	1.1%	1.1%

Notes: Percent of each group watching the time slot on that network.
The 8-8:30PM time slot contains shows aired at 8PM in the eastern and Pacific time zones and at 7PM in other time zones.

Table 3:
Black and Hispanic Shares of Thursday Prime Time Audience
1999-2000 Season

	Black Percentage					
	abc	cbs	fox	nbc	upn	wbx
8-8:30PM	6.8%	10.3%	14.4%	5.7%	26.7%	25.3%
8:30-9PM	6.3%	10.0%	14.6%	5.8%	26.0%	23.6%
9-9:30PM	6.2%	10.3%	16.7%	6.0%	25.3%	19.1%
9:30-10PM	6.1%	10.2%	16.2%	6.5%	24.8%	18.7%
10-10:30PM	8.2%	9.9%	14.3%	7.8%	23.4%	20.1%
10:30-11PM	8.6%	10.0%	15.0%	7.8%	22.1%	21.3%

	Hispanic Percentage					
	abc	cbs	fox	nbc	upn	Wbx
8-8:30PM	5.3%	4.5%	7.9%	7.9%	16.1%	13.0%
8:30-9PM	5.5%	4.1%	8.3%	7.8%	15.7%	13.1%
9-9:30PM	5.1%	4.4%	8.2%	6.3%	15.4%	14.3%
9:30-10PM	5.0%	4.3%	8.0%	6.6%	15.3%	14.1%
10-10:30PM	5.2%	5.3%	8.2%	6.2%	11.8%	11.7%
10:30-11PM	5.3%	5.3%	8.7%	6.1%	10.8%	10.7%

Notes: The 8-8:30PM time slot contains shows aired at 8PM in the eastern and Pacific time zones and at 7PM in other time zones.

Table 4: Cable Channel Viewing Tendencies by Race and Hispanic Status

	Tendency to Watch					Audience Share	
	Hispanic	Non-Hispanic	black	nonblack	Overall	Hisp	Black
A & E	24.8%	40.8%	33.2%	40.0%	78.4%	6.1%	9.4%
American Movie Classics	3.2%	3.6%	2.5%	3.7%	7.1%	8.9%	7.7%
Animal Planet	17.7%	17.6%	15.9%	17.8%	35.2%	9.8%	10.0%
BET	8.9%	7.5%	41.8%	3.4%	15.2%	11.3%	60.8%
BRAVO	1.2%	1.1%	0.8%	1.2%	2.2%	10.2%	7.5%
Cartoon Network	21.2%	14.6%	23.9%	14.2%	30.5%	13.5%	17.4%
Cinemax	15.1%	11.2%	20.5%	10.4%	23.1%	12.7%	19.7%
CMT (Country Music Television)	6.1%	10.6%	3.9%	10.9%	20.3%	5.9%	4.3%
CNBC	12.7%	20.6%	15.0%	20.4%	39.7%	6.2%	8.4%
CNN	23.8%	36.5%	29.4%	36.0%	70.6%	6.5%	9.2%
Comedy Central	17.2%	18.5%	18.6%	18.4%	36.8%	9.1%	11.2%
Court TV	9.4%	10.9%	20.7%	9.5%	21.5%	8.5%	21.4%
C-SPAN	0.4%	0.9%	1.4%	0.8%	1.8%	4.3%	17.2%
E!	15.3%	15.8%	14.9%	15.9%	31.6%	9.4%	10.4%
Encore	1.3%	0.7%	1.1%	0.7%	1.5%	17.4%	16.2%
ESPN	21.5%	30.7%	26.9%	30.2%	59.7%	7.0%	10.0%
ESPN Classic Sports Network	0.3%	0.4%	0.6%	0.3%	0.7%	9.3%	17.2%
ESPN2	14.2%	19.8%	16.2%	19.7%	38.5%	7.2%	9.3%
Florida News Channel	0.4%	0.4%	0.6%	0.4%	0.9%	9.8%	15.6%
Food Network	9.3%	11.1%	12.1%	10.8%	21.9%	8.3%	12.2%
FOX Family Channel	23.9%	28.7%	31.7%	27.8%	56.4%	8.2%	12.4%
FOX News Channel	11.8%	16.4%	19.2%	15.6%	32.0%	7.1%	13.3%
FOX Sports Espanol	3.2%	0.2%	0.8%	0.5%	1.0%	60.1%	16.9%
FOX Sports Net	9.7%	11.4%	10.4%	11.3%	22.4%	8.4%	10.3%
FOX Sports Ohio	3.2%	0.2%	0.8%	0.5%	1.0%	60.1%	16.9%
FOX Sports World	3.0%	2.6%	3.6%	2.5%	5.2%	11.3%	15.4%
FOX Sports World Espanol	1.8%	0.1%	0.3%	0.2%	0.5%	72.2%	13.8%
FX	7.9%	9.5%	8.9%	9.4%	18.7%	8.1%	10.5%
FXM	0.3%	0.4%	0.5%	0.3%	0.7%	8.1%	16.7%
Galavision	9.9%	0.2%	1.2%	1.1%	2.3%	84.7%	11.7%
GEMS	1.6%	0.1%	0.4%	0.2%	0.5%	64.3%	17.2%
HBO	27.9%	23.6%	39.9%	22.0%	48.0%	11.3%	18.4%
Headline News	11.7%	18.3%	17.3%	17.7%	35.3%	6.4%	10.8%
HGTV	6.8%	12.4%	7.9%	12.4%	23.8%	5.6%	7.4%
Home Shopping Network	5.3%	6.4%	9.1%	5.9%	12.5%	8.2%	16.1%
Home Team Sports (HTS)	0.3%	1.0%	1.7%	0.9%	1.9%	3.2%	18.9%
Lifetime Television	19.7%	25.5%	34.7%	23.7%	49.9%	7.7%	15.4%
MSG (Madison Square Garden Network)	1.4%	1.4%	1.7%	1.4%	2.9%	9.2%	12.8%
MSNBC	7.2%	12.0%	8.2%	11.9%	23.1%	6.1%	7.9%
MTV	21.3%	15.5%	20.7%	15.5%	32.1%	12.9%	14.3%
NECN (New England Cable News)	0.3%	0.6%	0.3%	0.6%	1.1%	5.7%	6.9%
NESN (New England Sports	0.2%	0.5%	0.2%	0.5%	1.0%	5.0%	3.7%

Network)							
Nick at Nite	11.0%	12.5%	16.4%	11.8%	24.7%	8.7%	14.7%
Nickelodeon	17.1%	13.5%	19.8%	13.1%	27.6%	12.0%	15.8%
None	23.6%	18.4%	18.3%	19.0%	37.9%	12.1%	10.7%
Other cable network/service	14.8%	13.1%	14.3%	13.2%	26.6%	10.8%	11.9%
Outdoor Life	0.3%	0.3%	0.2%	0.3%	0.6%	8.3%	8.0%
QVC	3.4%	5.8%	5.8%	5.5%	11.1%	6.0%	11.5%
Sci-Fi	12.5%	13.7%	18.0%	13.1%	27.2%	8.9%	14.6%
Showtime	13.1%	10.3%	21.0%	9.3%	21.2%	12.0%	22.0%
Speedvision	0.1%	0.1%	0.1%	0.1%	0.2%	10.8%	14.8%
SportsChannel Florida	0.8%	0.6%	0.6%	0.6%	1.2%	13.0%	12.4%
STARZ!	1.5%	1.4%	2.2%	1.3%	2.7%	10.5%	17.8%
Sunshine Network	0.8%	0.8%	0.8%	0.8%	1.5%	10.5%	11.7%
TBS	20.1%	27.9%	30.3%	26.8%	54.4%	7.2%	12.3%
The Discovery Channel	36.9%	40.8%	33.6%	41.2%	80.8%	8.9%	9.2%
The Disney Channel	21.4%	18.3%	19.9%	18.4%	37.2%	11.2%	11.9%
The Golf Channel	1.9%	4.1%	2.8%	4.0%	7.7%	4.7%	8.0%
The History Channel	17.9%	26.2%	20.9%	26.0%	50.9%	6.8%	9.1%
The Learning Channel (TLC)	16.6%	19.8%	17.7%	19.7%	39.0%	8.3%	10.1%
The Movie Channel	11.7%	11.0%	18.0%	10.2%	22.1%	10.3%	18.1%
The Weather Channel	24.1%	40.1%	32.6%	39.3%	77.0%	6.1%	9.4%
TNN	10.6%	18.8%	12.6%	18.6%	35.9%	5.7%	7.7%
TNT	24.7%	30.5%	34.9%	29.3%	59.8%	8.0%	12.9%
Travel Channel	6.2%	7.5%	5.8%	7.6%	14.8%	8.2%	8.7%
TV Guide Channel	5.1%	3.4%	4.5%	3.4%	7.0%	14.1%	14.1%
TVLand	4.5%	7.5%	9.5%	7.0%	14.5%	6.1%	14.5%
USA Network	22.8%	28.6%	30.5%	27.8%	56.2%	7.9%	12.0%
VH1	17.1%	14.6%	15.1%	14.9%	29.8%	11.1%	11.2%
WGN	0.8%	0.6%	0.7%	0.6%	1.3%	12.8%	12.8%

Table 5: Black-Targeted Half-Hours on Local and Network Television

	Local Shows with Audience Black % over				Prime Time Shows with Loc. Aud. Black % over			
	50	66	75	90	50	66	75	90
ABC Mean	10.27	5.48	3.55	1.97	0.11	0.02	0.02	0.00
66Max	137	102	64	19	3	1	1	0
CBS Mean	10.44	3.70	2.52	1.29	0.02	0.00	0.00	0.00
66Max	73	25	21	11	1	0	0	0
FOX Mean	27.20	16.41	12.26	7.68	0.62	0.18	0.08	0.00
66Max	200	159	123	64	18	5	4	0
NBC Mean	9.02	4.11	2.79	1.36	0.00	0.00	0.00	0.00
66Max	64	33	23	13	0	0	0	0
PAX Mean	11.34	7.16	5.96	4.04	1.68	0.55	0.38	0.13
56Max	59	47	45	38	17	9	7	2
PBS Mean	14.52	9.36	7.95	6.11	0.18	0.00	0.00	0.00
66Max	82	66	66	45	3	0	0	0
TEL Mean	1.80	1.00	0.80	0.80	0.13	0.13	0.13	0.13
15Max	6	5	4	4	1	1	1	1
UNI Mean	1.78	0.39	0.22	0.22	0.43	0.17	0.00	0.00
23Max	20	5	3	3	6	4	0	0
UPN Mean	43.23	30.91	25.18	16.93	7.38	4.95	3.80	2.13
56Max	149	121	107	80	40	28	18	14
WB Mean	37.88	26.60	22.55	15.43	5.80	3.73	2.78	1.48
60Max	149	138	130	88	24	21	13	9
IND Mean	16.83	10.61	8.39	6.44	1.85	0.8	0.44	0.34
41Max	91	47	34	31	22	7	4	4

Table 6: Hispanic-Targeted Half-Hours on Local and Network Television

		Local Shows with Audience Hisp % over				Prime Time Shows with Loc. Aud. Hisp % over			
		50	66	75	90	50	66	75	90
ABC	Mean	1.98	0.67	0.56	0.39	0.03	0.00	0.00	0.00
66	Max	36	14	13	10	2	0	0	0
CBS	Mean	2.08	0.95	0.71	0.36	0.00	0.00	0.00	0.00
66	Max	25	14	10	5	0	0	0	0
FOX	Mean	7.92	4.47	3.61	2.26	0.39	0.03	0.00	0.00
66	Max	100	60	45	22	17	1	0	0
NBC	Mean	2.15	0.86	0.64	0.30	0.03	0.00	0.00	0.00
66	Max	37	12	10	4	1	0	0	0
PAX	Mean	4.46	2.95	2.38	1.57	0.75	0.34	0.27	0.14
56	Max	52	36	32	14	7	5	5	4
PBS	Mean	8.21	5.17	4.15	3.20	0.35	0.05	0.03	0.02
66	Max	53	41	34	28	8	1	1	1
TEL	Mean	111.13	108.67	105.80	91.53	32.60	32.20	31.33	27.20
15	Max	214	214	209	174	44	44	44	43
UNI	Mean	175.87	172.13	168.91	147.00	41.65	41.26	39.96	32.13
23	Max	235	234	234	228	44	44	44	44
UPN	Mean	9.86	5.41	4.45	3.07	1.34	0.61	0.43	0.27
56	Max	55	38	33	26	13	7	7	7
WB	Mean	11.25	7.08	5.92	3.55	1.37	0.50	0.32	0.10
60	Max	105	79	65	45	20	9	8	4
IND	Mean	9.15	4.68	3.17	2.00	1.12	0.44	0.34	0.22
41	Max	67	33	17	16	9	5	5	5

Table 7: Market Size and Channel Availability

	(1)	(2)	(3)	(4)	(5)	(6)
	# Bdcst Channels	# Cable Channels	Total Channels	Log # Total Chnls	Log # Cable Chnls	Log # Total Chnls
Pop '90 (mil)	0.230	0.379	0.609			
	(0.053)**	(0.081)**	(0.116)**			
Log Pop '90				0.114	0.024	0.037
				(0.019)**	(0.006)**	(0.007)**
Constant	8.305	47.984	56.288	0.555	3.543	3.522
	(0.193)**	(0.296)**	(0.425)**	(0.273)*	(0.080)**	(0.093)**
Observations	66	66	66	66	66	66
R-squared	0.23	0.25	0.30	0.35	0.23	0.34

Standard errors in parentheses. * significant at 5%; ** significant at 1%

Table 8: Affiliate Presence and Group Size

	(1)	(2)	(3)	(4)
	WB Present	UPN Present	Telemundo Present	Univision Present
Black Pop. (mil.)	-1.312	1.397		
	(2.791)	(1.961)		
Non-black Pop. (mil)	4.417	0.571		
	(1.780)*	(0.436)		
Hisp. Pop. (mil)			11.755	87.033
			(3.214)**	(32.063)**
Non-Hisp. Pop (mil)			-0.920	-3.248
			(0.515)	(1.308)*
Constant	-1.509	0.188	-1.251	-1.658
	(0.991)	(0.403)	(0.479)**	(0.759)*
Observations	66	66	66	66

Notes: Probits on whether network's affiliate is present in the market. Standard errors in parentheses.
* significant at 5%; ** significant at 1%.

Table 9: Group-Targeted Programming and Local Group Population

A. Blacks

	(1)	(2)	(3)	(4)
	Local Black-Targ. Prog.	Local Black-Targ. Prog. on Ubiq. 4	Local Black-Targ. Prog.	Local Black-Targ. Prog. on Ubiq. 4
% Black	464.354	112.740	457.015	118.443
	(49.190)**	(16.137)**	(52.271)**	(17.027)**
Black Pop. (mil)			4.480	-3.481
			(10.244)	(3.337)
Constant	-7.130	-2.656	-7.489	-2.377
	(7.884)	(2.586)	(7.977)	(2.599)
Observations	66	66	66	66
R-squared	0.58	0.43	0.58	0.44

B. Hispanics

	(1)	(2)	(3)	(4)
	Local Hisp.-Targ. Prog.	Local Hisp.-Targ. Prog. on Ubiq. 4	Local Hisp.-Targ. Prog.	Local Hisp.-Targ. Prog. on Ubiq. 4
% Hisp.	1,148.043	34.734	982.285	45.404
	(84.663)**	(5.222)**	(91.670)**	(5.605)**
Hisp. Pop. (mil)			4.709	-0.303
			(1.359)**	(0.083)**
Constant	4.590	0.826	5.036	0.797
	(10.459)	(0.645)	(9.662)	(0.591)
Observations	66	66	66	66
R-squared	0.74	0.41	0.78	0.51

Notes: Dependent variable is number of non-evening prime time half hours with audiences 90+ percent Hispanic.
"Ubiquitous 4" networks (ABC, NBC, CBS, and Fox) are present in all 66 sample markets. Standard errors in parentheses.
* significant at 5%; ** significant at 1%

Table 10: Do Minority Viewers Value Minority-Targeted Programming?

	(1)	(2)	(3)	(4)	(5)	(6)
	Black OLS	Black IV	Black MSA FE	Hispanic OLS	Hispanic IV	Hispanic MSA FE
Black-Targeted Local Segs	0.016	0.026				
	(0.009)	(0.009)**				
Hisp.-Targeted Local Segs				0.013	0.007	
				(0.003)**	(0.004)	
Black Dummy			7.860			
			(0.305)**			
Hisp. Dummy						1.044
						(0.374)**
Black*90% Black Segs			0.023			
			(0.003)**			
Hisp.*90% Hisp Segs						0.014
						(0.001)**
Constant	21.735	20.909	15.147	16.026	17.347	15.837
	(1.192)**	(1.270)**	(0.270)**	(1.351)**	(1.612)**	(0.273)**
Observations	19793	19793	178784	17348	17348	178784
R-squared	0.06	0.05	0.10	0.04	0.04	0.09

Notes: Robust standard errors in parentheses (clustered on CMSA in cols 1, 2, 4, and 5). * significant at 5%; ** significant at 1%. Black and Hispanic targeted local segments are those with audiences that are at least 90 percent black or Hispanic, respectively.

Table 11: Direct Evidence of Preference Externalities in Local Television (Blacks)

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	Local Half Hours Viewed	Local Half Hours Viewed	Prime Time Half Hours Views	Prime Time Half Hours Views	Local Half Hours Viewed	Local Half Hours Viewed	Prime Time Half Hours Views	Prime Time Half Hours Views
	Non-black	Black	Non-black	Black	Non-black	Black	Non-black	Black
Black Pop (mil.)	-0.451	4.548	0.367	0.948				
	(0.822)	(1.049)**	(0.247)	(0.445)*				
Non-Black Pop (mil.)	0.026	-0.640	0.064	-0.054				
	(0.159)	(0.178)**	(0.032)	(0.069)				
% Black in CMSA					-1.667	15.599	-0.147	0.275
					(3.004)	(5.319)**	(1.352)	(2.006)
R-squared	0.10	0.06	0.05	0.01	0.10	0.06	0.05	0.01
Observations	158991	19793	158991	19793	158991	19793	158991	19793

Notes: Robust standard errors in parentheses (cluster on CMSA). * significant at 5%; ** significant at 1%. All specifications include age and sex dummies.

Table 12: Direct Evidence of Preference Externalities in Local Television (Hispanics & Non-Hispanics)

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
	Local Half Hours Viewed Non-Hisp.	Local Half Hours Viewed Hisp.	Prime Time Half Hours Views Non-Hisp.	Prime Time Half Hours Views Hisp.	Local Half Hours Viewed Non-Hisp.	Local Half Hours Viewed Hisp.	Prime Time Half Hours Views Non-Hisp.	Prime Time Half Hours Views Hisp.
Hispanic Pop (mil)	-0.238	0.021	-0.044	-0.075				
	(0.193)	(0.271)	(0.102)	(0.076)				
Non-Hispanic Pop (mil.)	-0.040	0.265	0.134	0.151				
	(0.072)	(0.119)*	(0.044)**	(0.031)**				
% Hispanic in CMSA					-3.337	6.719	4.005	1.829
					(3.035)	(4.256)	(1.091)**	(0.989)
Constant	16.192	18.092	7.460	8.043	16.226	18.056	7.509	8.285
	(0.477)**	(1.245)**	(0.200)**	(0.469)**	(0.455)**	(1.388)**	(0.214)**	(0.516)**
Observations	161436	17348	161436	17348	161436	17348	161436	17348
R-squared	0.10	0.04	0.05	0.02	0.10	0.03	0.05	0.02

Notes: Robust standard errors in parentheses (cluster on CMSA). * significant at 5%; ** significant at 1%. All specifications include age and sex dummies.

Table 13: Direct Evidence of Preference Externalities, MSA Fixed Effects Estimates

	(1)	(2)	(3)	(4)
	Half Hours Viewed Outside Prime Time	Half Hours Viewed Outside Prime Time	Half Hours Viewed Outside Prime Time	Half Hours Viewed Outside Prime Time
Black Dummy	3.817	6.429		
	(0.805)**	(0.000)		
Black Dummy* Black Percent	21.936			
	(2.131)**			
Black Dummy* Black Pop		5.758		
		(0.538)**		
Black Dummy* Non-Black Pop		-0.787		
		(0.097)**		
Hispanic Dummy			2.462	1.902
			(0.742)**	(0.718)**
Hisp. Dummy * Hisp Pop				0.099
				(0.208)
Hisp Dummy * % Hisp			7.018	
			(1.569)**	
Hisp. Dummy * Non-Hisp Pop				0.372
				(0.072)**
Observations	178784	178784	178784	178784
Number of cmsa	66	66	66	66
R-squared	0.10	0.10	0.09	0.09

Notes: All equations include MSA fixed effects, as well as group-specific age and gender dummies. Standard errors in parentheses. * significant at 5%; ** significant at 1%. Population is measure in millions.

APPENDIX C

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Cross-Ownership of Broadcast Stations and Newspaper	))	MM Docket No. 01-235
	)	
Newspaper/Radio Cross-Ownership Wavier Policy	)	MM Docket No. 96-197
	)	

STATEMENT OF C. EDWIN BAKER

My name is C. Edwin Baker. I am the Nicholas F. Gallicchio Professor, University of Pennsylvania School of Law. My expertise in the issues of media policy generally and those more specifically raised by this *Notice of Proposed Rulemaking* is well established. My recently published book, *Media, Markets, and Democracy* (Cambridge U. Press, 2002), is focused on conditions in which the market can be expected to fail to provide consumers with the media content they want and fail to provide citizens with the media content they need. I am the author of two prior books, *Human Liberty and Freedom of Speech* (Oxford U. Press, 1989) and *Advertising and a Democratic Press* (Princeton U. Press, 1994), that consider issues of free speech and media policy. I am also the author of numerous scholarly articles concerning media policy, the First Amendment, economic theory as well as other subjects. I have made scholarly and legal presentations concerning media policy or First Amendment freedoms in Canada, England, Scotland, Czech Republic, Israel, and Ethiopia as well as major universities in the United States including Harvard, Yale, Chicago, Stanford, University of California (Berkeley), New York University, and the University of Pennsylvania. This year I was asked to represent and speak about the American perspective on media concentration by the German Society of Comparative Law but had to cancel because of events in this country at the time of the September conference. I attach a copy of my most recent *curriculum vitae* .

The attached statement is filed in response to the above-captioned *Notice of Proposed Rulemaking.* This statement provides an overview of the rationale for the Commission's ownership rules, and discusses underlying economic and legal theory supporting those rules. The statement explains that ownership limits make a vital contribution to a well-functioning democracy. This analysis demonstrates that the newspaper-broadcast cross-ownership rule and the Commission's waiver policy for that rule should not be altered to allow further concentration in the relevant media industries. If changes are to be made, they ought to be in the direction of encouraging greater dispersal of media ownership.

Specifically, the statement shows that diversity of ownership serves a number of vital democratic functions that are undermined by media concentration. Part I shows that historically Congress and the FCC with unanimous Supreme Court approval have found ownership (or source) diversity and dispersal of media control, beyond that required to maintain the type of competition that the antitrust laws are designed to protect, to serve important societal interests. These interests have provided a basis for FCC rules and policies limiting ownership concentration at both national and local levels. Part III of the statement examines at least some of these important interests served by dispersal of media ownership, interests served by limiting concentration at both the local and national level. Part II explains why policy makers should reject arguments, made by some commentators, that ownership concentration is not a real problem until it reaches a level that restrains competition in violation of antitrust principles. Basically, that argument fails to understand the economics of media products as well as failing to take account of the non-economic public interests at stake in maintaining a broad dispersal of media ownership and control. Both economic and democratic theory show that media products and media markets are in important ways different from those products most easily handled by competition theory. These differences lead to systematic, predictable failures of media markets to function in a manner that adequately or efficiently serve public or consumer interests.

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December 3, 2001

GIVING UP ON DEMOCRACY: THE LEGAL REGULATION OF MEDIA OWNERSHIP

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GIVING UP ON DEMOCRACY: THE LEGAL REGULATION OF MEDIA OWNERSHIP

Long ago, a famous media journalist and press critic, A.J. Liebling, quipped: "freedom of the press belongs to those who own one."[1] This view makes ownership a central concern. And it has been. The single most important, semi-official study of the mass media in U.S. history was the Hutchins Commission Report in 1947.[2] Although very cautious about government intervention,[3] it saw the problem of concentration – "the decreased proportion of the people who can express their opinions and ideas through the press" – as one of three factors creating a threat to freedom of the press.[4] One way to understand the Commission's central recommendations concerning the need for a socially responsible press is that the Commission was trying to make the best of a bad situation. The reality is that modern economic forces seem to drive inexorably toward media concentration.[5] Most American cities were coming to face daily newspaper monopolies – a trend that has since increased, leaving only a handful of American cities with separately owned and operated daily papers. In any event, as a huge non-democratically organized force that has major power over both politics and culture, it is not a surprise that the media receive great attention and for most

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[1] A. J. Liebling, The Wayward Pressman 265 (1947) [ck]. In slightly different words – ""freedom of the press is guaranteed only to those who own one" – the same remark is quoted from later sources. E.g., A. J. Liebling, The Press 32 (2nd rev. ed, 1975).

[2] The Commission on Freedom of the Press, A Free and Responsible Press: A General Report on Mass Communication: Newspapers, Radio, Motion Pictures, Magazines, and Books (Chicago: U. of Chicago Press, 1947).

[3] Id. at 5, 83-86.

[4] Id. at 1. See also, id at 17, 37-44. Although clearly focused on dangers of media concentration, Zechariah Chafee, Jr., Government and Mass Communications, A Report from the Commission on Freedom of the Press, v. 2, 537-677, Chafee was very skeptical of use of law to restrict it. For example, though favoring "a very sparing use of the Antitrust laws against communications industries," id. at 674, Chafee emphasized the little they could do, id. at 653, 676-77, and the dangers in their use. Id. at 666-74.

[5] Cf. id. at 617 ("It is obvious, then, that bigness in the press is here to stay, whether we like it or not").

commentators, especially those on the left, the problem of concentration has long been a central concern.[6] The goal of this essay is to evaluate that concern.

Certainly, the concern with media concentration has long been a cornerstone of media policy. Part I of this Essay provides a rough description of the evolution of legal restrictions on ownership, including the recent trends that has been unambiguously hostile to legal restrictions.[7] This is the section that descriptively supports the Essay's title. My claim is that this examination shows that the legal order is giving up on democracy in two profoundly troubling ways. First, judicial doctrine evidences a declining willingness to accept legislative (democratic in contrast to market) structural policies in the media area, in a sense going back to a Lochner era notion of baseline organization. Second, policy makers, especially in the FCC, have been abandoning their earlier concerns with how media ownership can be structured to further a democratic community and are now apparently only concerned with making the media more responsive to the market. In both lower court constitutional and administrative policy realms, there has been a fundamental shift away from the notion that the media should be structured to promote a democratic communications order and toward the notion that the only goal of regulation should be to provide for effective market competition.

Of course, this criticism would not be persuasive if ownership concentration is not a problem. Part II describes and answers possible claims that concerns with ownership and undue concentration is either misguided or, at least, vastly overstated. Unless my or other answers to those claims are accepted, antitrust law as currently practiced may embody the only

[6] The literature is filled with both popular and scholarly discussions. Robert McChesney is possibly the best known leftist currently emphasizing the concern. See, e.g., Edward S. Herman & Robert W. McChesney, The Global Media: The new Missionaries of Corporate Capitalism (1997). A partial dissent, which in fact some of my writing may encourage, is to think the problem with the media is really with the market structure, which is the main determinant of the media content we get, not the specifics of ownership. See, e.g., Robert Brill Horwitz, Communication and Democratic Reform in South Africa (2001). Obviously, there is the possibility of having either policy criticisms of either or both independently or to think, as some do, that the second, market structure cures any problem with ownership. That position will be criticized in Part II, and the general position taken here is that both ownership and market structure are independent but interconnected problems.

[7] Since my concern here is primarily with concentration, this review will be selective. In broadcasting, for example, there are limits on foreign ownership, 47 U.S.C.§ 310(a)(b), and legal, technical, and character qualifications for licensees. 47 U.S.C.A. § 312. For the most part, these regulations of ownership will not be considered here.

needed limits on ownership. Given Part II's general rejection of these claims, Part III catalogues more specific objections to mass media concentration and suggests elements of a more desirable ownership policy. Both Parts II and III assert that the special democratic and cultural role of the media as well as features of the market for media goods explain why even a desirable recasting of antitrust law to include consideration of "non-economic" factors would be insufficient for optimal media ownership and argues that these roles justify special media related ownership policies.

I. Regulation of Media Concentration

Two parallel but intersecting stories must be told. The legal regime adopted by Congress or state legislative bodies and expanded by the work of administrative agencies must meet Constitutional standards. Change could occur in either the regime favored by policy makers or the Constitutional standards as understood by the courts. In fact, change has occurred in both dimensions. Although as will become clear, holding the two separate is somewhat artificial,[8] I will consider first the situation as it appears constitutionally and then look at development within the actual legal regime.

A. Constitutional Authority

Conceptually, the First Amendment might have at least three possible consequences in relation to media concentration. It might: (i) require the government to limit concentration, (ii) at least prohibit the government from affirmatively promoting concentration, or, conversely, (iii) limit the government's authority to restrict concentration.[9]

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[8] An illustration might be the invalidation by lower courts as unconstitutional a statutory ban on cross ownership of telephone company and cable systems in their local operating area, and the dismissal of an appeal of this holding as moot due to Congressional action that on policy grounds eliminated the challenged restrictions. United States v. Chesapeake & Potomac Telephone Co., 516 U.S. 415 (1996) (vacating lower rulings after passage of the Telecommunications Act of 1996).

[9] Analytically, there is also the possibility that the First Amendment requires the government to promote concentration. I leave that out – no one that I know has advanced such a position even as a possibility.

American constitutional jurisprudence generally shies away from finding affirmative obligations and instead mostly identifies only Constitutional prohibitions on impermissible government action. Thus, unsurprisingly, the Constitution has never been authoritatively interpreted the first way – to require the government to limit concentration. The occasional attempts even in narrow circumstances to read the Constitution to impose a duty to regulate concentrated media in order to secure greater opportunities for outside speakers to communicate over those concentrated media have not resulted in favorable court decisions – although the possibility has not been completely foreclosed by existing case law. In the most prominent case, a political party and a public interest group each asked the court to require (or to require the government, that is, the FCC, to require) a television network to air their paid editorial advertisements. The plaintiffs claimed that government involvement in broadcast licensing and in prohibiting non-licensed broadcasting were among the factors that created state action and that this state action created a constitutional duty to see that broadcasters accept communications by outsiders, especially for those outsiders willing to pay to have their message presented. With only Justices Brennan and Marshall dissenting on this point, the Supreme Court rejected the claim.[10] Similar issues can occur in varying contexts and courts might in some circumstances be more sympathetic. In a subsequent suit, a claim was made that at least when the government grants monopoly control of a communications medium, namely cable, to a single company, the Constitution requires that the government condition its monopoly grant on some duty of the government-created monopolist to allow some public access in the use of the medium. Without a court ruling on this or the plaintiffs' other claims, the case settled in favor of the plaintiffs.[11]

Second, the First Amendment might restrict the government's power to purposefully promote media concentration or at least monopoly ownership. The claim would be that any such policy restricts the speech, that is, the First Amendment rights, of those who do not then

[10] CBS v. DNC, 412 U.S. 94 (1973).

[11] Missouri Knights of the Ku Klux Klan v. Kansas City, 723 F.Supp. 1347, 1350, 1353 (refusing to dismiss this or other more traditional claims made by the plaintiffs). I should disclose that I advocated including this claim in the complaint.

own a media outlet or who are not granted the monopoly. Against this claim, the government can assert authority to conclude that sometimes a monopoly or a more concentrated ownership regime would lead to more efficient use of resources – and a better overall communications order. Essentially, for some portions of the communications order, such authority historically has been assumed – that is, in relation to telephone operating companies – even though current policy wholeheartedly takes the opposite policy position of trying to promote competition.

The theoretical premise for this type of power would be that the government should be able to engage in structural regulation in trying to improve the quality of communications realm. Thus, a lower court once upheld FCC authority to deny a license to an available slot in the broadcast spectrum space if the agency concluded that the additional broadcast licensee would undermine the economic viability or quality of broadcast service provided in a given geographical area.[12] The rationale would be that the area might provide inadequate (advertising) revenue to support quality broadcasting by the larger number of stations and, if this were the case, the grant would result in ruinous competition. Although the policy of considering denial of licenses on this ground – the "Carroll doctrine" – was eventually dropped, the policy was never found impermissible on constitutional grounds.[13]

More recently, potential competitors relied on the First Amendment in challenging government grants of cable franchise monopolies. The government was not totally clear in its policy rationale for granting an exclusive license. Apparently viable is the claim that a monopoly provider using a single wire would require less economic and physical resources to provide a given geographical area with cable service. Additional cable franchisees may not provide substantially different communication content but would require large expenditures on "duplicative" facilities for which someone, ultimately the residential users, would have to

[12] Carroll Broadcasting Co. v. FCC, 258 f.2d 440 (D.C.Cir. 1958)

[13] Policies Regarding Detrimental Effects of Proposed New Broadcasting Station on Existing Broadcasting Stations, 3 FCC Rcd. 638 (1988) (eliminating Carroll doctrine). Since the doctrine authorized restraint of speech on grounds obviously unrelated to physical scarcity, it is informative that the doctrine was noted, specifically without either approval or disapproval, by the Supreme Court in Red Lion Broadcasting v. FCC, 395 U.S. 367, 401 n28 (1969).

pay - again, a form of the "ruinous competition" argument. The monopoly grant could be combined with regulations that direct some of the potential monopoly profits be spent on various communication-oriented public benefits – for example, public access, educational, or governmental (PEG) channels and maybe facilities to support these channels, or an obligation to provide cable service to the entire community (even unprofitable areas). In addition, the government could try to control monopoly profits through rate regulation. Essentially the policy goal would be not to waste resources and direct that the saving go to providing better communications content or less costly service to the consumer audiences. The hope is that an exclusive franchise would eliminate competing but largely duplicative cable services, while regulation could limit monopoly profits while using some profits to pay for publicly valued services not provided by market competition. If the regulation could be successful, there would be a media specific reason to believe a monopoly franchise could be desirable in some circumstances.

Nevertheless, a Supreme Court decision, Los Angeles v. Preferred Communications,[14] is widely interpreted as finding such a monopoly franchise to be unconstitutional. This interpretation, however, probably over-reads the decision. The Court intentionally narrowly limited its holding. It only approved the view that there might be a First Amendment violation – it postponed deciding the issue – if the City "refus[ed] to issue a franchise to more than one cable television company when there was sufficient excess physical *and economic capacity* to accommodate more than one."[15] Although subsequent discussion has focused mostly on the issue of physical capacity, the Court's formulation obviously leaves open to interpretation the issue of "sufficient excess ... economic capacity." Is there sufficient capacity whenever more than one system could survive in a competitive market? Or, alternatively, is there sufficient economic capacity only when the additional system would not

[14] 476 U.S. 488 (1986).

[15] Id. at 492 (emphasis added). The Court refused to decide the legal issue, but remanded in order to provide an opportunity to develop a factual record. Lower courts held the monopoly franchise grant to be unconstitutional at least in the context of the Los Angeles case. Preferred Communications v. Los Angeles, 13 F.3d 1327 (9th Cir. 1994).

undermine provision of the level or quality of service that the City desired, and deliver it at the lowest possible cost to the members of the public? These matters have not been resolved.

Finally, the third possibility, that the First Amendment limits the government's authority to restrict concentration, is the matter of most interest here. It shows how, without justification or self-conscious explanation, doctrine has been shifting.

The third possibility might initially seem the least plausible. Such a reading could, for example, provide some constitutional protection to corporate attempts to amass monopolistic or otherwise vast communications empires, a result that might be thought to undermine a diverse, pluralist marketplace of ideas. Is such a reading supportable? The answer from the Supreme Court has consistently been "no" – although some corporate media clearly wished the answer were otherwise.

The claim first came before the Court when the print media argued that the First Amendment exempted them from government antitrust regulation. The Supreme Court forcibly rejected the assertion in 1945. Justice Black wrote for the Court: "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom.... Freedom of the press from governmental interference ... does not sanction repression of that freedom by private interests."[16] The government was allowed to intervene to promote freedom!

Although the issue was slightly different, earlier in 1943, a broadcast network challenged rules designed to prevent broadcast network's contractual control of affiliate local stations – in effect an anti-concentration measure since it was designed to limit network power and protect the decision making authority of local broadcasters. In upholding the rules, the Court unanimously rejected the industry's First Amendment claim.[17] And the Court has never backed away from this position. For example, in rejecting corporate First Amendment claims, the Court in 1978 unanimously upheld limitations on a newspaper owning broadcast

[16] Associated Press v. United States, 326 U.S. 1, 20 (1945).

[17] National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

stations in the locale in which the newspaper company operated.[18] In an earlier 1956 case, although not raising the Constitutional issue, the Court upheld national limits on the number of broadcast stations a single entity could directly or indirectly control (a limit of seven) against a statutory challenge.[19] As will be discussed further below, these cases represent a history in which the Supreme Court always upholds Congressional structural regulation of the media, that is, regulation not tied to or aimed at suppressing particular media content, against attacks as a violation of the First Amendment rights of corporate owners.[20] In the context of structural regulation, the only structural regulation questioned by the Court was the case noted above where the legislative body – a city government – was creating, not defusing, concentration in the cable industry. There the Court found that this would be objectionable unless the city could show a good reason for its action.[21]

If the Supreme Court has been clear, recent decisions by the lower courts show that they have *not* gotten the message. Lower courts have been increasingly finding regulations of communications industries to be unconstitutional interferences with asserted First Amendment rights to be free from structural regulation. Without a complete review, two lower court cases illustrate this point in relation to ownership. (Moreover, as the Court has recently become increasingly activist, conservative, unprincipled, and pro-market, there can be little grounds for confidence that it will remain constant to its past approach. Despite consistently upholding structural media regulations, its recent decisions have been cast in language suggesting the possibility of invalidating regulations on First Amendment grounds if

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[18] FCC v National Citizens Committee for Broadcasting, 436 U.S. 775 (1978).

[19] United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

[20] See C. Edwin Baker, Turner Broadcasting: Content-Based Regulation of Persons and Presses, 1994 Sup. Ct. Rev. 57.

[21] Los Angeles v. Preferred Communications, 476 U.S. 488 (1986). Although not related to control of concentration, the sole case sometimes cited for limiting government's power to engage in structural regulation, Miami Herald v. Tornillo, has been interpreted by the Court to have struck down the right to reply law because of it being an improper penalty for specific content, that is, a content not a structural regulation. Turner Broadcasting v. FCC, 512 U.S. 622, 653-55 (1994). See generally, Baker, supra note 95.

corporate lawyers can convince a court that they are inadequately justified[22] – an approach that may encourage abuse by lower courts.)

In the first, Congress and the FCC had concluded that telephone companies should not own cable systems in the geographic area of their joint operation. This ownership regulation could serve various purposes including promoting competition. The idea is that the phone companies were allowed to offer "carriage" of cable programming over their phone lines. This exploitation of their "wires" would potentially produce competition for the local cable company. As a common carrier, the phone company would not be permitted to discriminate among potential video services wishing to deliver programming, thus creating the possibility of multiple competitors who would not be required to engage in the huge cost of laying their own lines. Among the fears behind the prohibition of phone ownership of cable or the sale of access of comparable content to local phone subscribers was a belief that if the phone company itself sold cable programming to the public, the phone company could inappropriately cross subsidize its cable service with revenue from its regulated phone service revenues, thereby competing unfairly. Worse, it was feared that the phone company could and would discriminate in favor of its own programming in contrast to video programming of other entities who might deliver programming over the phone lines. Although regulation could prohibit either of these evils,[23] the complex accounting and behavioral practices involved would make these regulations awfully difficult to enforce effectively. This regulatory difficulty, however, would be made largely eliminated if the phone company was

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[22] In Turner Broadcasting System v. FCC, 512 U.S. 622 (1994), the Court emphasized the use of scrutiny language purportedly to evaluate the constitutionality of media regulations. This practice has been continued in subsequent cases. In Denver Area Educational Telecom. Consortium v. FCC, 518 U.S. 727 (1996), in an opinion offering a scrutiny analysis, the Court properly struck down portions of a law requiring suppression or giving cable systems authority to suppress indecency. Despite the government's in many respects plausible claim that the law was merely a structural regulation of cable, to the extent the decision invalidated the statute, it should be applauded for identifying as a constitutional evil the statute's aim of suppressing content. The scrutiny analysis, however, did not aide but only confused the Court's reasoning.

[23] Although even this is unclear given some lower court decisions suggesting that phone companies may have a first amendment right to discriminate against some parties who want to use the phone service on the basis of the content of the users speech. Carlin Communications v. Mountain States Tel. & Tel. Co., 827 F.2d 1291 (9th Cir. 1987); Carlin Communications v. Southern Bell Te. & Tel Co., 802 F.2d 1352 (11th Cir. 1986).

told that, as long as it was a phone company (a common carrier), it could not also be a different type of company – a cable company. It had to choose what business it was in. As a phone company, it must stay out of the business of selling content to the public. Nevertheless, two circuits found that this argument bordered on the irrational. They then held that the bar on phone company ownership violated the telephone companies' First Amendment rights.[24] The notion seemingly implicit in all past Supreme Court decisions on the subject, that regulation of various corporate entities in an effort to promote a better communications order did not raise serious First Amendment issues, was implicitly rejected. Whether the holdings in these cases are authoritative is unclear. After Congress adopted legislation that, in the name of deregulation, eliminated this restriction on the telephone companies, the Supreme Court vacated the Court of Appeals decisions without indicating any view on the merits.[25] But clearly the cases indicate an attitude about rights of corporate entities entirely absent, at least until recently, in any Supreme Court decision.

Second is a case involving ownership of cable systems. At the direction of Congress, the FCC adopted a rule restricting ownership of local cable systems by multiple cable operators ("MSO"). The FCC allowed MSOs to own cable systems that serve no more than 30% of the country's subscribers to multichannel video program distributor services (primarily subscribers to cable and direct broadcast satellite). A comparison might put this rule in context. The country has about 12,600 radio stations and about 10,400 cable systems. The Supreme Court has upheld an FCC rule (since abandoned) restricting a single entity from owning more than seven FM and seven AM radio stations.[26] If each owner owned a maximum number, there would be at least 900 radio station owners in the country. The FCC's new cable rule restricted a single entity from owning cable systems that serve more than 30% of the country's subscribers – or, assuming roughly equal sized systems, from

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[24] Chesapeake and Potomac Telephone Co. v. United States, 42 F.3d 181 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996); U.S. West v. United States, 48 F.3d 1092 (9th Cir. 1994), *vacated*, 516 U.S. 1155 (1966).

[25] Id.

[26] United States v. Storer Broadcasting, 351 U.S. 192 (1956).

owning more than about 3,467 cable systems, and permitting four companies to own all the country's cable systems. The Court of Appeals recognized the existence of Constitutional authority to adopt laws that prevent concentration to a degree that would allow a single company to control the survival of any particular programmer.[27] However, taking the constitutional challenge very seriously, the court observed that this rule, which restricted a single owner to owning 30% of the cable systems, "interferes with [the cable owners'] speech rights by restricting the number of viewers to whom they can speak."[28] The court then avoided the constitutional issue by finding that, "on the record before it, the "30% horizontal limit was in excess of [the FCC's] statutory authority."[29] The Court commented that it could understand reasoning that "would justify a horizontal limit of 60%." That is, the Court implied that it would uphold a rule that ensure that one entity did not own all the country's cable systems – that is, it implied that two could be required but the court indicated serious constitutional doubts about a rule that would assure a minimum of four owners.[30]

Although not specifically regulating concentration but rather carriage, a second holding of *Time Warner* and one additional lower court decision might be mentioned to illustrate this newly developed way of thinking. Requirements that cable systems carry programming other than their own partially responds to the anti-competitive effects of vertical integration – the combining delivery and programming. These carriage requirements are also a boon to the media entities who want but would otherwise not get to have their programming carried. They do, however, restrict the power of the cable company to reach its audience

[27]Time Warner Entertainment Co. v. FCC, 240 F.3rd 1126, 1131 (D.C.Cir. 2001).

[28] Id. at 1129. This is, of course, untrue. Under the rule, the cable owner could, just like anyone else in the country, try to get owners of cable systems to carry its messages. What the cable operator wanted, however, was to have the same speech rights that, on the courts reasoning, potentially only one other speaker (one other corporation) in the country would have – the opportunity to use its own monopolized facilities to speak to people and to have this right in relation to half the people in the country.

[29] Id. at 1136. As to another FCC rule, a prohibition on using over 40% of the first 75 channels for programming owned by the cable operator or affiliated firms, the Court of Appeals found that the FCC had not justified it under the appropriate First Amendment standard. Id. at 1139.

[30] Id. at 1132.

through as many microphones, that is, channels, as possible.[31] According to the court in *Time Warner*, this requirement creates constitutional problems, a conclusion in apparent conflict with the Court's holding in *Turner Broadcasting*, which upheld must carry requirements and where the only real doubts were whether the requirements were content based.[32]

Despite the Supreme Court's decision upholding must carry rules, another lower court subsequently found that a local regulation that required local cable operators to provide carriage facilities to competing broadband Internet Service Providers violated the cable operators' First Amendment rights.[33] Likewise, in *Time Warner*, the Court of Appeals found that the Congressionally-directed FCC requirement that the cable systems make up to 40% of their channel capacity available to non-affiliate programmers – essentially making the cable operator a common carrier for this portion of its cable capacity – violated the First Amendment. In reaching this conclusion, the court relied heavily on the scrutiny analysis in *Turner*. This mechanical application of questionable black letter formula arguably represents a dangerous lawyering practice. What is stunning about this reliance is that the court ignored *Turner's* actual holding and analysis. The *Turner* majority upheld requirements that the cable system carry programming that it did not want to carry – a holding that the lower courts in *Broward County* and *Time Warner* apparently reject. Possibly even more dramatic, these lower courts ignored Justice O'Connor's dissent in *Turner*, which indicated more scepticism of government regulation and thus might have been thought to have provided these lower courts some support in their rebellion against established law. Her dissent, joined by the other three other Justices, found no First Amendment problem with imposing this common carriage duty on cable operators for at least some of their channels.[34] Her only objection to

[31] Of course, the requirement only limits the cable operator's ability to reach audience members through its own facilities. The requirement that these facilities be open to others does not restrict the operator's opportunity to place its programming on other's systems.

[32] *Turner Broadcasting I,* 512 U.S. 622; *Turner Broadcasting II*, 520 U.S. 180 (1997).

[33] Comcast Cablevision of Broward County v. Broward County, 124 F.Supp. 2d 665 (2000).

[34] 512 U.S. 622 at 684.

the law in *Turner* was that it was content based, which is not a problem relevant to the content neutral laws invalidated in the subsequent lower court decisions. Thus, even the four Justices most sympathetic to the cable operators' First Amendment claims suggested the priority of doing precisely what the Court of Appeals found unconstitutional in *Time Warner*.

Between them, these lower court decisions concerning restrictions on telephone company ownership of cable and limits on ownership of cable company's represents a dramatic shift in constitutional treatment of ownership. While prior Supreme Court decisions indicated virtually no problem with much more severe restrictions, these lower court decisions represent a new attitude, probably abetted by the increasing use of the Court's recent introduction of scrutiny tests to evaluate even structural media regulations.[35] A quick interpretation of the change is that the courts are offering a new view of the First Amendment. Prior case law often protected the autonomy of individual speakers – for example, their right to try to speak to as many willing listeners as they can find. However, the earlier case law's concern with regulation of the press only involved objections to censorship[36] – regulations striking at the heart of the media's function of serving a democratic society's need for non-governmentally created or approved information and vision. The Court never conceived the corporate media as themselves subjects whose moral autonomy must be respected.[37] Rather, any type of structural regulation that could be reasonably seen to serve a better, more robust democracy was accepted as a matter of course. The Court saw absolutely no serious First Amendment interest in opposition to structural regulation to assure a better – a more diverse, more participatory, a less concentrated – media order. In the new world now being offered, the corporate media are the central rights-bearing subjects. Interference with these huge, often

[35] See infra note 108.

[36] Although the Court initially offered two, apparently different justifications for its decision in Miami Herald v. Tornillo, 418 U.S. 241 (1974), the Court has since limited the rationale of *Miami Herald* to the concern with content-based censorship. See, e.g., *Turner I*, 512 U.S. 622 at 644, 653-54.

[37] This lack of moral autonomy explains why must-carry rules as well as other structural regulations do not run afoul of basic First Amendment protections of the individual such as were involved in the flag salute case. West Virginia St. Bd of Educ. v. Barnette, 319 U.S. 624 (1943). See also Wooley v. Maynard, 430 U.S. 705 (1977) (cannot be forced to display on license plate a motto to which the driver objects).

monopolistic institutions is now seen as a first amendment offense. Justice Black's admonition in *Associated Press* has been forgotten.

B. Concentration Policy

Both general and media specific laws restrict media ownership. Media specific rules typically do not eliminate any requirements of more general rules, so that a media entity that meets the requirements of one is not exempt from the other. Of course, occasionally media specific law operate to limit application of the general law. Even though a combination of the business side of two newspapers might violate the antitrust laws, if the Attorney General approves a "joint operating agreement" (JOA) under the procedures of the Newspaper Preservation Act, the antitrust restriction does not apply (although the antitrust laws continue to apply to other behavior of the combination). Media specific regulations also generally vary from media to media. This section first describes general antitrust law as it relates to media concentration and then turns to the media specific laws, concentrating on newspapers, broadcasting, and cable.

<u>1. Antitrust laws.</u> The federal antitrust laws generally apply to all business entities (at least if they are engaged in or affect interstate commerce) including all communications media.[38] They constitute the major general legal restriction on media mergers. In the broadcast context, however, until recently FCC ownership rules were sufficiently restrictive that antitrust laws were seldom relevant. Current deregulatory moves by the FCC have, however, changed the situation to some degree. For example, in several recent cases, mergers of local radio stations allowed by the FCC have been found to be anti-competitive by the Justice Department in its application of the antitrust laws.[39]

Under current interpretations, antitrust law's restriction on mergers have as their dominant and, many commentators argue, exclusive aim "that mergers should not be

[38] For an overview of antitrust law as applied to the mass media, see H. Peter Nesvold, Note: Communication Breakdown: Developing an Antitrust Model for Multimedia Mergers and Acquisitions, 6 <u>Fordham Intell. Prop., Media & Enter. L. J.</u> 781 (1996).

[39] See *infra* note 108.

permitted to create or enhance market power or to facilitate its exercise" in order to prevent "a transfer of wealth from buyers to sellers or a misallocation of resources."[40] Undoubtedly, enforcement that achieves this goal will in fact serve non-economic purposes as well, but it is less clear whether these additional purposes should be taken into account in application of the antitrust laws. Plenty of history, for example, suggests an important "democratic" concern with concentration of power.[41] A strong case could be made that non-economic considerations, such as democratically-based concerns relating to diversity in the marketplace of ideas or to the capacity of a single firm or small numbers of firms to dominate in the formation of public opinion, are particularly persuasive in the context of the mass media.[42] Still, probably the dominant view, often labeled the Chicago School approach, would not consider anything other than the economic impact of a merger – or, more specifically, a merger's effect on the firm's capacity to engage in monopoly or anti-competitive pricing (and, thereby, its effect on output). Although, this dominant paradigm may not currently prevail to the exclusion of other considerations within the media realm,[43] I generally assume its dominance within the descriptive portion of this Essay.

The antitrust provision most relevant for media mergers is Section 7 of the Clayton Act, which prohibits mergers "where in any line of commerce ... in any section of the country, the effect of such acquisition may be to substantially lessen competition or tend to create a

[40] U.S. Dept. of Justice and the Federal Trade Commission, Horizontal Merger Guidelines (1992, revised 1997) 0.1 <http://www.usdoj.gov/atr/public/guidelines/horiz_book/10.html>

[41] Se, e.g., Rudolph J. R. Peritz, Competition Policy in America: History, Rhetoric, Law (2000).

[42] Robert Pitofsky, The Political Content of Antitrust, 127 U.Pa.L.Rev. 1051 (1979). Maurice E. Stucke & Allen P. Grunes, Antitrust and the Marketplace of Ideas, 69 Antitrust L.J. 249 (2001).

[43] Since the two (or more) newspapers in a JOA combine for purposes of setting circulation and advertising rates, thereby potentially creating monopoly power, its termination could hardly lessen competition in these economic arenas of competition. Nevertheless, a termination with the expectation that the weaker paper would then close does lessen competition in the ideas or editorial content marketplace. This consideration leads to a lower court's finding an antitrust violation in such a case, clearly indicating an antitrust concern not only with price competition but also with marketplace of ideas values. See Hawaii v. Gannett, 99 F.Supp.2d 1241, 1249-50 (D.Haw.), aff'd 203 F.3d 832 (9th Cir. 1999). But see Reilly v. Hearst, 107 F.Supp.1192 (N.D.Cal. 2000) (rejecting similar argument). See Stucke & Grunes, supra note 42, at 270-74.

monopoly, ”[44] although also sometimes relevant are the Sherman Act, which refers a “combination ... in restraint of trade,”[45] and the section 5 of the FTC Act, which refers to an “unfair method of competition.”[46] The Section 7 analysis requires an identification of a market – which according to the Department of Justice and FTC *Merger Guidelines* is identified by an economic test: a market consists of any product category and geographic area such that a profit maximizing firm, if it became the only firm (now or in the relevantly near future) selling that product in that area, would be able profitably to “impose at least a ‘small but significant and nontransitory’ increase in price.”[47] Any combination of an area and a geographic category where this power would exist constitutes a relevant market for antitrust enforcement purposes. As a second step, the analysis then considers the degree of concentration the actual proposed merger would create – a relevant but not determinative factor for determining whether the merger is legally problematic. As a rule of thumb, the agencies usually use market share in a relevant product and geographic market as measured in dollar terms or, in some cases in physical terms of sales, shipments, production, capacity or reserves.[48] The legally determinative question is the extent the merger is or is not likely to create or enhance market power or facilitate its exercise, and other factors beyond actual levels of concentration may be crucial here.[49] For example, lack of any significant barriers of entry could mean that even a combination that creates a very concentrated market may not create any market power over prices.

The guideline criteria are logically defined and calibrated to find any market in which a merger would cause an increase in power over prices, but the science of applying even

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[44] 15 U.S.C. § 18 (1988).

[45] 15 U.S.C.§ 1 (1988).

[46] 15 U.S.C. § 45 (1988).

[47] Merger Guidelines § 1.0.

[48] Id. at § 1.4.

[49] Id. at § 1.5.

technically flawless formula is hardly exact. In particular, disputes about appropriate identification of markets, both in terms of identifying the relevant product category and geographic boundary, are rampant but the conclusions are quite consequential. Relatively obvious applications of this approach can make many huge mergers unproblematic, at least for purposes of this dominant conception of antitrust law. For example, since local media in different areas seldom compete against each other, huge newspaper chains or national ownership of huge numbers of broadcast stations or cable systems would create little problem from an antitrust perspective.[50]

Defining product markets is even more difficult. Are all information and entertainment media substitutable and thus part of the same market, as the FCC has reportedly maintained for the last twenty years,[51] or is each media a category into itself, as the courts have usually held in respect to newspapers[52] and the Department of Justice has concluded in respect to radio broadcasting?[53] Is the relevant market the one for advertising – since, for example, that is all a broadcaster sells, or is it the consumer market for a particular type of media content – e.g., television programming? In each of the infinite number of market formulations possible, the key question within this analysis, however, seems to be locating contexts in which merges could increase a firm's potential power over price.

An alternative view would be that the primary or, at least, a prominent, policy concern in the media arena should be power within the so called marketplace of ideas.[54] This emphasis could suggest dramatically different formulations of both the relevant markets and

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[50] Although not made explicit, implicit adoption of this type of antitrust analysis was apparently central to the court holding in Time Warner Entertainment Co. v. FCC, 240 F.3rd 1126 (D.C.Cir. 2001), that the FCC rule allowing a single entity to own no more than 30% of the country's cable systems had not been justified.

[51] See Nesvold, supra note 38, at 823 n262, 856 n452.

[52] Id. at 823-29. See United States v. Times Mirror, 247 F.Supp. 606, 617 (1968).

[53] United States v. CBS Corp., 63 Fed. Reg. 18,036 (DOJ 1998); Sarah Elizabeth Leeper, The Game of Radiopoly: An Antitrust perspective of Consolidation in the Radio Industry, 52 Fed. Comm. L.J. 473, 482-83 (2000).

[54] See Stucke and Grunes, supra note 42.

degree of problematic concentration. Consider the claim, appropriate from the perspective of an emphasis on the marketplace of ideas but that antitrust regulators are likely to consider irrelevant: the relevant market is, within each mass media medium, entities appealing to an audience which has not only a particular type of interest but a particular viewpoint, e.g., broadcast stations appealing to young activists or black power proponents.[55] From the perspective of this audience, the market would be monopolized if "activist ideas" or "black power ideas" are not offered on multiple comparable media. The point here is that the dominant antitrust focus on *power over pricing* can be distinguished from *power over content consumer choice.* In the currently dominant paradigm, a merger dramatically reduced the number of independent suppliers of a particular category of content – say, news or local news or black activist thought – would create no antitrust problem if it did not lead to power to raise prices. However, if the concern is power to inefficiently and negatively affect "consumers," power over content should have a status at least equal to power over price.[56]

In addition to the horizontal mergers already considered, other mergers occur that are often categorized as non-horizontal, a category that is sometimes subdivided as between vertical and conglomerate. (In some respects "conglomerate" mergers may be more like horizontal than vertical mergers[57]). Mergers of directly competing enterprises – horizontal mergers – create obvious issues whether the concern is market power over pricing or power to reduce choice and pluralism. However, the reasons are less obvious for objecting to vertical

[55] Under some conditions this narrow market definition might even be relevant within a traditional antitrust analysis. Specifically, if an audience category were both sufficiently defined and sufficiently valued by advertisers that uniquely serving them would give a media firm power over advertising rates (or in the case of print media, also power over prices to consumers), this audience might be considered a proper category for antitrust purposes. Still, an antitrust regulator is likely to conclude that although only one radio station in a community offers content desired by this group, potential competition exists from other stations in the area. Thus, the low barriers of entry for these stations means that the single station would not be able to exercise improper market power over price. This potential competition does little, however, to provide actual competition in any marketplace of ideas or to provide this narrow audience choices relevant to their interests.

[56] This point is effectively elaborated and applied to media industries in Neil W. Averitt & Robert H. Lande, Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law, 65 Antitrust L.J. 713, 715, 752-53 (1997).

[57] Herbert Hovenkamp, Federal Antitrust Policy, 2nd ed. 388 (1999)

mergers, where the merger combines firms engaged in different parts of production and distribution system for a single type of product, or to conglomerate mergers, where the merger combines firms that provide different products. Nevertheless, vertical mergers were once widely condemned by both academics and courts as generally unnecessary and anti-competitive. Since the 1960s, however, Chicago school commentators have argued that this type of merger seldom (if ever) causes harm to consumers and almost always produces important efficiencies.[58] Antitrust enforcement against vertical mergers has become rare and normally applied only in limited contexts.[59]

United States v. Paramount Pictures[60] illustrates both the prior attitude and the current trend. The 1948 Supreme Court decision involved a vertical price fixing conspiracy, not a vertical merger, but the same reasoning should generally apply – the concern is the impermissible market power of the integrated entity. In *Paramount Pictures*, the challenged price fixing involved vertical arrangements between the separate activities of producing, distributing, and exhibiting first run movie theatre releases. The Supreme Court affirmed an order requiring divestiture of some ownership interests in theatres by producer/distributor defendants and directed the district court on remand to evaluate the legitimacy of such ownership in other cases.[61] The subsequent consent judgment required divestiture of the defendant producer/distributors' ownership interests in theatres and severely restricted future ownership of theatres by the defendant movie producers. This framework prevailed in the industry for 40 years. Then in 1989, the Court of Appeals lifted the portion of the consent

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[58] Eleanor M. Fox & Lawrence A. Sullivan, Cases and Materials on Antitrust 839-41 (1989); Hovenkamp, supra note 57, 377 n.1 (citing articles by Richard Posner and Frank Easterbrook for proposition that vertical mergers should generally be permitted and by Robert Bork that they should always be legal); id. at 381 (noting a dramatic shift in policy toward allowing vertical integration since the 1960s).

[59] Hovenkamp, supra note 57, at 386 (prevailing judicial approach to condemn only in extreme circumstances); id. at 389-90 (suggesting that Justice Department's Merger Guidelines reflect little attempt to police vertical mergers); Fox and Lawrence, supra note , at 840 (little enforcement since mid-1960).

[60] 334 U.S. 131 (1948).

[61] Id. at 151-53.

decree that would have applied to Warner Brother's owning theatres.[62] Although the court's finding of "changed circumstances" point is possibly well taken, the decision probably represents the generally less skeptical, modern attitude toward vertical integration.

Still, some life remains in never completely repudiated objections to vertical integration. During the 1990s, some notable antitrust attacks on vertical integration occurred within the media realm. For example, the FTC opposed aspects of QVC Network's (owned in part by a major cable programmer and a major cable system operator) proposed acquisition of Paramount Pictures (a major programmer) and obtained a consent decree – although the decree did not go into effect because the proposed merger did not materialize. The FTC's objection was that the vertically integrated firm, which would both produce programming and distribute it to consumers, could purportedly cause a decline in the quality and output of premium movie channels due to the programmer's bias in favor of its "own" programming.[63] Likewise, in a merger of a major cable system operator, TCI, and a major program producer, Liberty Media Corporation, the Justice Department obtained a consent decree designed to restrict feared anti-competitive effects on its cable systems' competitors who might otherwise be denied access to Liberty Media's programming. The consent decree also aimed at protecting competing programmers who might be disadvantaged in providing programming to the firm's cable operating systems.[64]

In sum, historically, both market power antitrust concerns and non-antitrust concerns have provided justifications to limit vertical integration in the media industries. Although, as will be noted below, some media specific limits on non-horizontal mergers remain and although Congress still occasionally indicates concerns with vertical integration, the dominant trend in recent decades has been to find objections to vertical integration largely unpersuasive. Instead, the dominant view has been that legal restraints on vertical integration often leads to inefficiencies and injury to consumers and that these economic concerns should be dominant.

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[62] United States v. Loews's, Inc., 882 F.2d 29 (2nd Cir. 1989).

[63] ABA Section of Antitrust Law, Antitrust Law Developments 4th ed. 354(1997).

[64] Id. at 355.

Even when Congress or the FCC does impose restraints that would serve non-economic values, the lower courts often seem unable to understand any but antitrust type economic arguments and ready to hold the restraints to be unconstitutional restraints on the media corporation's freedom of speech, a new and troubling concept almost entirely absent in earlier Supreme Court precedent.

2. Newspapers. It is often blithely asserted that broadcasting, where federal licensing was introduced as a means to respond to the "chaos" of unregulated use of the airwave "commons,"[65] is the only area where special regulation of First Amendment protected mass media makes sense – and even in the broadcast arena academic writing increasingly challenges the constitutionality of regulation. Still, after long avoidance and difficult discussion of the questions of both justification and proper standards of review, considerable regulation of cable has been permitted. In contrast, special structural regulation of newspapers is often thought contrary to bedrock First Amendment principles. I have argued elsewhere that this view is wrong both normatively and descriptively.[66]

Of course, despite industry claims that they violate the press' First Amendment rights, antitrust laws are recognized to apply to newspapers. The concern here, however, is laws specifically directed at newspapers (or the media). One such regulation distinguishes newspapers from other business, say grocery stores. The FCC had long been sensitive to the problems that local newspaper-broadcasting combinations posed but originally decided to evaluate them on a case by case basis.[67] It eventually changed its mind. In 1975, the

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[65] This chaos/commons quality arguably provides the best understanding both of federal intervention in broadcasting and of the Court's opinions in crucial cases such as Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969). See Baker infra note 95 . The standard view—which from the beginning some judicial language suggests, which the Court currently reads its earlier decisions to suggest, and which may be easier to understand but which is also more vulnerable to savage and effective critique—is that government regulation was based on an inherent scarcity of broadcast frequencies.

[66] Baker, infra note 95. A minor but supportive observation is that possibly the primary case, repeatedly relied upon by the Court in *Red Lion*, 395 U.S. 367 (1969), for upholding structural regulatory power aimed at increasing diversity in the market place of ideas was a case involving newspapers, Associated Press v. United States, 326 U.S. 1 (1945).

[67] Newspaper Ownership of Radio Stations, Notice of Dismissal of Proceeding, 9 Fed. Reg. 702 (1944).

Commission amended its rules to bar new licenses that would result in cross ownership of a newspaper and a broadcast station within a single area; moreover, it required divestiture of existing combinations in "egregious" cases.[68] Its regulations meant that a newspaper, simply because it is a (constitutionally protected) newspaper, is (generally) barred from owning a broadcast station in their area of joint operation. The Supreme Court unanimously upheld these rules against statutory and constitutional challenges, including both the claim that the rule unconstitutionally discriminatorily restricted newspapers' right to own communication facilities and the claim that it unconstitutionally treated some newspapers – those required to divest – worse than others.[69]

The key legislation respecting newspaper competition is the Newspaper Preservation Act (NPA).[70] A Supreme Court decision had found an antitrust violation in a joint operating agreement (JOA), whereby two newspapers in a single city combine their business operations, split the profits in a prearranged manner, but keep separate and independent editorial staffs.[71] Subsequently, in response to lobbying by significant portions (but not all) of the newspaper industry, Congress adopted the NPA. The Act allowed pre-existing JOAs to continue and new ones to be created, with the written consent of the Attorney General who must first find that not more than one of the joined papers is not failing financially. This legislation has considerable jurisprudential relevance. The law is not merely a special privilege for newspapers. From the beginning some newspapers and members of Congress saw, and as some newspapers later argued to the courts, that the NPA differentially advantaged some while disadvantaging other newspapers. For example, a JOA between two metropolitan papers can competitively harm smaller weekly or the suburban dailies papers in the area.

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[68] 50 F.C.C.2d 1046, 32 R.R.2d 954.

[69] FCC v National Citizens Committee for Broadcasting, 436 U.S. 775 (1978). Interestingly, unlike current doctrine that often employs a form of supposed heightened scrutiny, the Court simply explained that "[t]he regulations are a *reasonable means* of promoting the public interest in diversified mass communications; thus they do not violate the First Amendment ..." Id. at 801 (emphasis added).

[70] Pub.L. 91-353, 84 Stat. 466 (1970), codified at 15 U.S.C.A. §§ 1801 et. seq.

[71] Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).

Judicial decisions upholding the Act against constitutional attack on this ground imply the propriety of legislation that has an undoubted purpose to improve the communications order as a whole even if the legislature knows that the law will work to the disadvantage of some media entities within that order.[72]

These two examples show that newspaper ownership has been subject to media specific ownership or concentration laws that restrict (i.e., the limit on ownership of broadcast facilities) or disadvantage (i.e., the NPA) some newspaper firms. In these cases, however, Congress' quite clear policy goal was not to prevent the existence of monopoly power over prices but, instead, to regulate ownership in order to increase the number of independent media voices.

3. Broadcasting. The FCC has long restricted allocation of broadcast licenses in a manner to promote pluralism and restrict concentration both within local markets and at the national level.[73] Here I will briefly review this history and then describe and comment upon the comparatively recent and ongoing change in direction.

Consider local concentration first. In 1938, the FCC refused to grant a radio broadcasting license to an applicant that already controlled another broadcast station in the area. The decision began what became known as the "duopoly" rule, a refusal to grant multiple licenses for similar types of facilities in the same broadcast area to a single entity or to financially related entities.[74] For a considerable historical period, the FCC would grant to a single owner at most one each of several different types of facilities - AM radio, FM radio, and television. The FCC tightened this restriction in 1971 when it adopted a rule against granting to a single owner a license for both a VHF television and a radio station within a

[72] Committee for an Independent P-I v. Hearst Corp., 704 F.2d 467, 482-83 (9th Cir.), cert denied, 464 U.S. 892 (1983).

[73] Somewhat separate from the concentration concern, foreign ownership or control of broadcast facilities has been restricted since the original Communications Act of 1937, 47 U.S.C. § 310(b)(1). More detail on ownership rules can be found in Harvey L. Zuckerman et al., *Modern Communications Law* 1196-1213 (1999).

[74] Marc A. Franklin, *Mass Media Law, 3rd ed.* 847 (1987); Rules Governing Standard and High Frequency Broadcast Stations, § 3.228(a), 5 Fed. Reg. 2382, 2384 (1940). "Attribution" rules determine when formally independent corporate entities are sufficiently connected financially to bring the ownership restrictions into play.

community.[75] Already in 1970, it prohibited cross-ownership in a single community of a television station and a cable system, then a newly developing category of video enterprise.[76] As noted, the FCC has also prohibited cross-ownership of a newspaper and broadcast station within a single area.[77]

The FCC began restricting national concentration of station ownership in 1940s, when it explicitly limited ownership to six FM radio stations and three TV stations.[78] In 1953 it adopted a rule restricting ownership by any entity to seven stations in each service category – AM radio, FM radio, and television.[79] The FCC also prohibited any entity's ownership of more than one broadcast network.[80] Because of huge economies of scale, networks have long been of major importance, especially in packaging and distributing program content for broadcasters. The economics of broadcasting made it likely that, if left to market decisions, many local stations would not only broadcast material produced and distributed by one of the several national networks but also, in its affiliation agreement, be willing to bargain away most of its control of programming to the network. The FCC sensibly believed that any evil that concentration would create could equally result from multiple separately owned broadcast stations contractually handing over editorial control to a single entity. Ownership dispersion was designed not just to generate separate station ownership but rather was intended to assure a plurality of people and firms making independent programming decisions. Thus, the FCC early on adopted a panoply of rules designed to assure control and responsibility remained in

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[75] Multiple Ownership of Standard, FM and TV Broadcast Stations, 28 FCC2d 662, 21 R.R.2d 1551 (1971). In contrast to the preferred VHF television licenses, combinations where allowed involving the economically and technologically less attractive UHF television licenses.

[76] CATV, Second Report and Oder, 23 F.C.C.2d 816 (1970).

[77] See TAN.

[78] This history is summarized in *In the Matter of the Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership*. 100 FCC2d 17 (1984).

[79] Rules and Regulations Related to Multiple Ownership, 18 F.C.C. 288 (1953); United States v. Storer Broadcasting Co., 351 U.S. 192 (1965) (upholding rules).

[80] Rules and Regulations Governing Commercial Television, § 4.226, 6 Fed. Reg. 2284, 2285 (1941).

the hands of individual licensees rather than being transferred through contractual agreements to a national network - the so called “chain broadcasting rules.” These essentially anti-concentration rules were upheld against statutory and First Amendment attack.[81] Still, even during this period of intense concern about the dispersal of ownership and control of broadcast stations, the FCC rejected proposals to deny broadcast licenses to non-media conglomerates, as most prominently illustrated in its approval of a later abandoned attempt by ITT to merge with ABC.[82]

The differences between the historical FCC and the Chicago school antitrust responses to concentration are clear. The central antitrust issue has been market power, specifically market power over prices. In contrast, FCC ownership policy was never concerned solely or even primarily with market power, either local or national. Without fully developing the point, this can be seen in relation to numerous FCC policies and practices. In addition to technical qualifications necessary to obtain a broadcast license, in its comparative licensing process the FCC asserted two primary objectives: quality of broadcast service and, secondly, “*a maximum diffusion of control* of the media of mass communication.”[83] Thus, the FCC said it would favor license applicants that would contribute “diversification of control of the media of mass communications” and, secondly, would favor applicants that promise “full time participation in station operation by owners.”[84] This second factor effectively favored both local ownership and, in a sense, worker ownership or, at least, hands on management by owners as well as general diffusion of control. Moreover, the FCC maintained policies

[81] National Broadcasting Co. v. United States, 319 U.S. 190 (1943). These rules have been repealed in respect to radio but to some extent have continued to apply to television, 47 C.F.R. § 73.658, although even there, in its deregulatory frenzy, the FCC has eliminated several restrictions that it has concluded are obsolete. Review of the Commission’s Regulations Governing Television Broadcasting, 10 FCC Rcd. 4538 (1995).

[82] Memorandum Opinion and Order 7 F.C.C.2d 245, 9 R.R.2d 12 (1966).

[83] Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965) (emphasis added).

[84] Id. After almost 30 years, this “integration of ownership and management criterion was found to be unjustified by the court. See Bechtel v. FCC, 10 F.3d 875 (1993).

designed to promote ownership by women and minorities, hoping to expand the pluralism of media voices.[85]

Other structural policies also illustrate that the FCC concern was much more with ownership dispersal than with economic competition. For example, those favoring more competition have attacked the FCC policy goal of providing television stations for most local communities. These critics argued that allowing larger stations with broader reach would have encouraged earlier creation of more than the three competing television networks that dominated broadcasting from the 1950s to the 1980s. In order to control signal interference, the FCC's local-oriented allocation meant that many communities(for a long period of time) were reached by no more than three stations, with the result that the market did not support development of additional networks, which apparently needed local affiliates covering most of the country in order to succeed financially. But even if these critics were right that this FCC policy prevented greater network competition and for the average audience member reduced viewing choice, that should not end the argument. The FCC policy did support the goal of providing local communities their own mediums of communication and increased the number of owner/participants in the broadcasting realm.

In sum, licensing rules that directly favored dispersal of ownership and limited concentrated ownership, that favored integration of ownership and control, and that required the owner to bear ultimate responsibility for broadcasts, thereby limiting network power over local stations, have in common that they all combine to increase the number of decision makers who make choices about what content to broadcast. This dispersal itself, not competition or efficiency, was clearly long central to FCC policy.

4. Broadcasting: Changed Directions. At least by 1982, a move toward so-called deregulation had begun. That year, Mark Fowler, later Chair of the FCC, and Daniel Brenner

[85] The policies in respect to minorities were upheld against a constitutional challenge of race discrimination in a 5-4 decision by Justice William Brennan in his last opinion for the Court. Metro Broadcasting v. FCC, 497 U.S. 547 (1990). The case's approach to affirmative action, although not the specific holding related to the FCC policy, has since been overruled. Adarand Constructors v. Pena, 515 U.S. 200 (1995).

published their famous article advocating a marketplace approach to broadcast regulation.[86] In 1984, the FCC expanded the national limits on station ownership from the 7-7-7 rule to a 12-12-12 rule plus a sunset provision aimed at entirely eliminating FCC restrictions on ownership concentration in six years. Partly due to pressure from Congress, the Commission pulled back, for example, eliminating the sunset provision and imposing a new limit on the proportion (25%) of the national audience that a single owner could reach within a given broadcast category.[87]

Still, the trend had been set. In 1992, the Commission expanded permissible ownership for radio to eighteen AM and eighteen FM stations.[88] The Telecommunications Act of 1996 energized the shift. The Act eliminated the statutory restriction (but not the FCC rules) on cross-ownership of a broadcast station and cable system and on cross-ownership of a broadcast network and cable systems.[89] Congress also removed all limits on the total number of radio or television stations that can be jointly owned. The Act left ownership of radio unregulated – which resulted in an immediate "orgy of consolidation."[90] For television, the Act only limited the proportion of the national audience that the single ownership group could reach, which it increased from 25% to 35%.[91] Possibly more important, the Act directed the

[86] Mark S. Fowler & Daniel L. Brenner, "A Marketplace Approach to Broadcast Regulation," 60 Tex.L.Rev. 207 (1982).

[87] Greater reach was allowed if the owner partnered with owners coming from a racial minority group. This represented a common FCC strategy employed in several contexts to allow a partial exemption from a burdensome rule if the licensee acted in a way to increase minority ownership or control of broadcast licenses. These policies are mostly outside the scope of this Essay. See generally, Ronald J. Krotoszynski, Jr., & Richard M. Blaiklock, "Enhancing The Spectrum: Media Power, Democracy, and the Marketplace of Ideas," 2000 U.Ill.L.Rev. 813.

[88] Revision of Radio Rules and Policies, 7 FCC Rcd. 6387 (1992).

[89] Id. at § 202(I) & 202(f).

[90] Krotoszynski & Blaiklock, supra note , at 815 n7. For example, at the time of the 1996 Act, the largest radio ownership group consisted of less than forty stations. By September 2000, a single owner held over 1,000 of the country's 12,600 stations and several owners had more than 100 stations each. Federal Communications Commission Issues Biennial Regulatory Review Report for the Year 2000, Doc. No. 00-75. 2001 FCC LEXIS 378 (Jan. 17, 2001) [hereafter Biennial Report 2000] at *96-97, para. 111.

[91] Telecommunications Act of 1996, Pub. L. 104-104, § 202(c), 110 Stat. 56 (1996).

FCC to reconsider most remaining ownership limitations. Thus, in 1998, the FCC began proceedings to consider eliminating the rule prohibiting newspaper/broadcaster cross-ownership in a single community. It initiated proceedings to eliminate the remaining "chain broadcasting" or network rules – the rules that unanimously upheld by the Supreme Court in 1943 that restricted concentration of programming power in the network and protected some autonomy for local station decision making.[92] In 1999, the FCC adopted new rules concerning joint ownership within a community. First, these rules narrowed the situations where two stations would be considered overlapping for purposes of the ownership restraints. Second, it expanded permissible joint ownership to allow, even without rule waiver but depending on other factors including the number of independent stations remaining, ownership of two television stations and up to six radio stations in a single local market (with smaller ownership combinations allowed in smaller, less competitive markets).[93]

A complete, up-to-date list of current rules might not be important here, in part because it is likely to be soon out-of-date. The general point is clear. Up until the early 1980s, FCC policy was basically to restrict ownership concentration both locally and nationally. Local ownership combinations were usually only allowed when combined ownership was the only way that a broadcast service was likely to be provided to the area.

[92] National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[93] FCC Revises Local Television Ownership Rules, Report No. 99-8, 1999 FCC LEXIS 3736. One consequence of this rule was that it allowed the merger, announced shortly after the rules adoption, of CBS and Viacom. Since ownership of two stations in a market was now permitted, the merged company's overlapping stations were mostly no longer a problem. Still, the merged company faced the FCC's 35% television audience cap and the bar on owning two networks, with the FCC requiring that they conform over time. At the time of this writing, the FCC has just announced that a merger of a major (e.g., CBS) with a minor network (e.g., UPN) would henceforth be allowed. Press Statement Dual Network Report and Order Michael K. Powell, 2001 FCC Lexis 2164 (4/19/01). Permitting ownership of two television stations also leads to a prediction concerning the response to the 35% cap. Under this rule, Viacom could trade stations with another media conglomerate, News Corp. (Fox), whose expected purchase of stations from Chris-Craft would also put its audience reach over the top. The trade would give each conglomerate a second television station in a market in which it already owns one and where the two conglomerates would otherwise compete, leaving each with duopolies in single cities (whose audience would only be counted once toward the cap on audience reach). A likely reason that such a deal has not (yet) occurred is the high likelihood that the FCC will soon increase or eliminate the percentage cap on audience reach or that the courts will hold it unconstitutional, making the swap unnecessary. Michael Greppi, "Viacom Stay Puts Sway on Hold," *Electronic Media* (Apr. 9, 2001), p. 1. FCC Approves Fox Chris-Craft Merger with Conditions, 2001 FCC Lexis 4000 (7/25/01).

Even then, ownership of multiple stations or services was only permitted if the combined service seemed particularly valuable. The presumption was relentlessly against concentration. Since the early 1980s, the orientation has flipped. The policy direction has been toward eliminating legal restraints on concentration, with the presumption being that mergers should be allowed unless clear and specific problems with the combination could be shown. Interestingly, one consequence of the increasing withdrawal of the FCC from restraining concentration is that the arguably inadequate tools of antitrust law, interpreted as merely concerned with market power, have become newly relevant as a restraint. Since the older FCC rules were mostly more restrictive of concentration than antitrust, antitrust enforcement agencies formerly had little need to consider broadcast merger issues. This is no longer true. For example in respect to the consolidating trends in radio, it has been the Antitrust Division of the Department of Justice that has restricted several mergers.[94]

Although not always clearly articulated, this endeavor to eliminate ownership restrictions embodies four interrelated changes in basic assumptions. First, most overtly, is a new unbounded and unprobed faith in the market. The market will purportedly lead the concentrated but competitive firms to provide the audience with the mix of content they want.[95]

Second, maintenance (or creation) of competition is treated as virtually the only important policy concern. Thus, wide dispersal of ownership – previously seen as in a sense a good in itself or, more programmatically, as the good of providing for simply more independent voices, less concentrated power over public opinion, more opportunities to be a broadcast "speaker," as well as potentially more viewpoint diversity – is now seen as unimportant, possibly inefficient, as long as competition exists.[96] From this new perspective,

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[94] Leeper, supra note 53; Zuckerman, supra note 73, at 1206.

[95] I have systematically critiqued this assumption. C. Edwin Baker, *Media, Markets, and Democracy*, Part I (Cambridge, 2002), revising my "Giving the Audience What It Wants," 58 Ohio St.L.J. 311 (1997).

[96] This characterization is impressionistic and I would like to be wrong. The FCC still invokes a concern with diversity as a means to provide competition within the marketplace of ideas as well as with competition in an economic sense. My impression is, however, that this diversity concern today is almost an afterthought, much

the FCC appropriately allows multiple ownership within a local community as long as an adequate number of competing firms continue. And this focus on economic competition makes objection to national ownership of large numbers of stations hard to rationalize. Since stations operate locally, ownership of multiple geographically separated stations does not reduce competition in any observable market. (This is the same consideration that makes chain ownership of daily newspapers in different areas usually not a matter of antitrust concern.)

Third, policy commentators observe competition coming from increasing number of directions. Relevant competition could come from many sources other than those providing the particular media service at issue – in its most extreme form, this perspective sees all media as competing with each other, or even more grandly, media as merely being a form of entertainment that is not too concentrated as long as other forms of entertainment are available. More recently, if media competition is not found elsewhere, it is said that the Internet provides (or will soon provide) all the competition we want – maybe more.

Finally, although not articulated as a specific policy premise, the regulatory change likely reflects an increasing willingness to bow to industry wishes for the profits or corporate aggrandizement that could come through greater concentration. In fact, sometimes government policymakers explicitly suggest that in order for American firms to dominate globally, they need to be huge and less restrained by government[97] – a concern that hardly relates to providing the media needed by the public either in their role as consumers or as citizens.

5. Cable. Since local legally granted franchise monopolies were once the norm[98] and local monopolies are still the realistic norm, restrictions on concentration have mostly related

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less likely than previously to be the determinative consideration in any decision and is instead window dressing or pro forma add-on.

[97] U.S. Department of Commerce, Globalization of the Mass Media (Washington: U.S.G.P.O., 1993).

[98] The policy of granting franchise monopolies was challenged in court, see Los Angeles v Preferred Communications, 476 U.S. 488 (1986), and eventually the 1992 Cable Act statutorily barred granting exclusive franchises. 47 U.S.C.A. §541.

either to local cross-ownership patterns or to national concentration. As for national concentration, at Congress' direction, the FCC recently imposed a 30% limit on national ownership of multi-channel video systems, but the Court of Appeals struck the regulation as unauthorized.[99] As for local cross-ownership, I noted earlier that both statutes and FCC rules once prohibited mutual ownership of a cable system and telephone company operating in the same area. The 1996 Telecommunications Act removed the statutory limit,[100] although *purchase* of an existing service within the buyer's area of operation is generally still barred by rule. The 1992 Cable Act prohibited common ownership of cable and various other video delivery systems, specifically multichannel multipoint distribution (MMDS) and satellite master antenna television services (SMATV).[101] But then the FCC, as authorized and directed by the 1996 Act, amended the restrictions to allow cross-ownership in communities with "effective competition."[102] Possibly most important, historically the law prohibited common ownership of cable systems and broadcast facilities within each other's service area and restricted common ownership of any cable system and a broadcast network. The FCC in 1992 relaxed and then the 1996 Act eliminated the bar on network ownership of cable systems. And the 1996 Act eliminated the statutory bar but left intact the FCC rules that prohibited cross-ownership of a cable system and a local broadcast station.[103]

<u>6. Measuring Concentration.</u> Any policy focus on concentration raises the problem of measurement. As seen, the FCC has traditionally restricted the number of broadcast stations

[99] Time Warner Entertainment Co. v. FCC, 240 F.3rd 1126, 1131 (D.C.Cir. 2001).

[100] 47 U.S.C.§§ 571-72.

[101] 47 U.S.C. § 533. MMDS or wireless cable are licensed to transmit multiple channel programming in a smaller area using microwave frequencies and SMATV are essentially cable systems that distribute programming received by satellite in high density areas without using or crossing public right-or-ways.

[102] Implementation of Sections 202(f), 202(i) and 301(i) of the Telecommunications Act of 1996, 11 FCC Rcd. 15115 (1996); 47 C.F.R.§ 21.912 and § 76.501(f) (1997).

[103] Id. At present, the FCC has left this bar intact. FCC, Broadcast Services; Radio Stations, Television Stations, 65 Fed. Register 43333, 43345-47 (July 13, 2000). More detail on the cable cross ownership rules can be found in Zuckerman, supra note 73, at 1148-52.

within a particular service - AM radio, FM radio, or TV (with some distinctions in rules depending on whether the TV station was of the preferred VHF or the less desired UHF variety) that a firm could own nationally or within a given market. This focus makes sense, I suggest, as long as the concern is, as it clearly was during much of the FCC history, with the opportunity of competing speakers (or firms) to enter the broadcast realm. Some multiple ownership was allowed, presumably partly out of a concern for efficiencies of multiple ownership and possibly more importantly to make use of the operational expertise multiple owners brought to broadcasting. Still, the rules, consistently upheld by the courts, seemed properly designed to further a goal of giving opportunities to multiple, hopefully diverse, (usually corporate) speakers. Media power was democratically dispersed. Within this framework, however, any “market share” analysis was inappropriate. Obviously, there should not be a policy that in any way penalizes any of this myriad of speaker for being appealing. Thus, a limit on actual audience share would be a quite questionable focus – though in this context of strict ownership limits, such a measure would have generally been irrelevant anyhow.

With recent rules that loosen or abandon limitations on stations owned, any remaining measurements of concentration have taken new forms. The law’s current limitations on ownership of multiple TV stations focuses on “market reach.” A single ownership group cannot own stations that reach more than 35% of the country’s audience. Note, however, that this measure relates not to the viewers that the group garners but to the reach of its signals – a measure of potential audience. It is not be immediately clear why such a measure would be chosen. Such an owner might have very little influence – for example, if virtually no one watched its programming – or might have tremendous influence if its programming were extremely popular. This rule does assure that the country as a whole will be served by a variety of different speakers, each of whose potential power is limited. Possibly the earlier concern with potential concentration of power over public opinion, rather than merely antitrust efficiency concerns, remain an implicit basis of policy. Under this rule, a popular demagogue could only speak directly to 35% of the country or, more precisely, could only speak to 35% over her own stations. One wonders if such a rule would have allowed Italy to escape the Berlusconi premiership.[104]

In contrast, actual subscribers, not potential reach, was the concern of the FCC's recently judicially rejected rule relating to cable ownership. This "market share" rule limited an entity to owning cable systems that garner no more than 30% of the nations multichannel video subscribers. As people increasingly obtain the bulk of their home video media through multichannel video providers (mostly cable but also increasing Direct Broadcast Satellite service), this rule meant that one owner would not be able to control more than 30% of the home video audience, a clear limit on a single owner's power over the nation's audience.[105]

The FCC's earlier stringent limits on broadcast station ownership left little need for antitrust enforcement. This has changed with the new era, most overtly signaled by the Telecommunications Act of 1996, in which both Congress and the FCC have dramatically reduced or eliminated prior limits on ownership. Antitrust laws may now become relevant – so its measures of concentration have become relevant. Since over the air broadcasting is mostly provided free to the audience, concern with market power over pricing has unsurprisingly focused primarily on broadcast firms' power within the advertising market.[106]

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[104] "Italy's Man of the Moment," Milwaukee J. Sentinel 10A (May 29, 2001); "The Empire," The Guardian (London) 13 (May 25, 2001).

[105] At the direction of Congress, the FCC tried to limit this power in additional ways. The other FCC imposed limit—this one invalidated on First Amendment grounds in the same Court of Appeals decision—limited the power of the single owner by requiring that its cable systems use no more than 40% of its channel capacity for programming content provided by itself or affiliated firms, leaving 60% of the channel capacity to be used by non-affiliated firms. Time Warner Entertainment Co. v. FCC, 240 F.3rd 1126, 1131 (D.C.Cir. 2001). The clear conclusion is that Congress has remained concerned with the distribution of media power within the country, a typical concern routinely upheld by the Supreme Court, but the Court of Appeals currently has a deaf ear to anything but evidence of undue market power over price.

[106] There is also the potential matter of power in the programming market – that is, the market in which distributors sell programming to distributors such as broadcasters. This market, for example, was the arena the Court of Appeals thought might justify a rule that would prevent one owner from owning cable systems that supply more than 60% of the public with their access to multichannel video programs – a curiously high percentage given traditional antitrust use of an HHI index. *Time Warner*, 240 F.3rd 1126. The Court of Appeals' reasoning would allow an ownership structure of two owners with a 60% and 40% ownership share respectively, which using the HHI index, in which anything over 1800 is typically considered highly concentrated, gives an HHI score of 5200.

Power is usually measured in part by market share (combined with other factors such as easy of entry and product substitutability). Accepting that radio advertising provides a relevant product market, the Justice Department apparently concludes that concentration is most relevantly (and maybe most easily) identified on the basis of the percentage of radio advertising revenue a firm garners within a market. Thus, recently the Justice Department has in practice opposed any merger that gives the new entity over 50% of the radio advertising revenue in a (local) market and has reached out of court settlements embodying its view – over industry objections that the relevant product market is advertising in all media, not radio advertising.[107] Still, the Justice Department's articulated view is that no set figure is determinative and that "each market must be investigated separately." Thus, in several cases it has successfully restricted mergers that would have resulted in 40% share of the radio advertising market.[108]

These different examples should make clear that a concern with concentration must address not only the *degree* of concentration that is too great but also the appropriate *measure* of that concentration. The examples further illustrate that the choice of measure as well as the permissible degree of concentration will depend in part on the reason concentration is considered a potential problem. The goal is more or less maximum independent owners, although this goal might be balanced to some degree against other concerns, from the perspective of democratic pluralism. Market reach might be relevant in opposing too great of an undemocratic concentration of potential power over public opinion. Finally, market share within relevant product and geographic markets seems more relevant for antitrust regulation.

[107] Christopher H. Sterling, "Forward," in Benjamin M. Compaine & Douglas Gomery, Who Owns the Media, 3rd ed. xviii (2000) (referring to Justice Department guidelines limiting ownership to controlling more than half the advertising revenue in major markets). Id. at 317 (noting Justice Department consent decrees approving mergers only after selling stations to reduce advertising revenues in market to less than 50%).

[108] Elisabeth A. Rathbun, Justice Tells ARS to Sell Stations, 126 Broadcasting and Cable #45, p. 10 (Oct. 28, 1996). Ira Teinowitz and Michael Wilke, Justice Depart. Sets 40% as Guide on Radio Mergers; Solutions Tied to Target Audience Paves Way for Westinghouse Deal for Infinity, Advertising Age 65 (Nov. 18, 1996). In agreeing to the Westinghouse purchase of Infinity Broadcasting, Justice required the sale of stations that would have allowed Westinghouse's share of the radio advertising market in Philadelphia to rise from 28% to 45% and in Boston from 15% to 40%, indicating that sometimes a 40% share is too much. Id.

7. Summary. Some generalizations about ownership regulation are possible. Antitrust regulation can serve many values in addition to narrowly defined economic efficiency – values such as promotion of consumer choice. Powerful arguments are consistently made that concentration should be restricted in service of various of those values. Nevertheless, in practice the economic concern with market power and consequent power to inefficiently raise prices and to transfer wealth from buyers to sellers has been almost the sole evident concern in the application of antitrust laws in the media context, especially in recent years.

Historically, neither Congress nor the FCC focused on economic efficiency in developing media specific ownership rules, rules that were routinely upheld by the courts. They especially invoked values centered on providing for diversity and for larger numbers of independent mass media voices to justify or explain their media specific regulations. For example, the antitrust concern with market power cannot explain narrowly limiting the total number of broadcast stations that could be directly or indirectly owned by a single entity – say to three or seven or twelve stations nationally within a particular service category (television, AM radio, FM radio). Instead, this limit most obviously serves goals of limiting the power of any single owner over public opinion or public discourse, of enhancing the number of enterprises that will be involved in controlling broadcast expression, and *arguably* of increasing the likelihood that the participants will be more diverse, leading to more diverse content. Preferences given in initial licensing and in approving license transfers (sales) have also explicitly aimed at increasing diversity of ownership as measured by race or gender. Licensing preferences for integration of ownership and management both increase the likelihood of a dispersal of ownership and could favorably influence content if local and involved owners are more likely to be responsive to local communication needs as opposed to merely bottom line considerations. The "one to a market" licensing rule – one station within a given service category within a local market – clearly went beyond any restraint that antitrust efficiency concerns justifies. Instead, it furthered aims of limiting concentrated power over public discourse and, even more overtly, increased the number of independent, potentially disparate voices that could be heard within a community. Limits on local media cross-ownership served the same concerns. Although the issue was "control," not ownership, the “chain broadcasting” rules limiting the option of a local broadcaster to bargain away control over portions of its broadcast day severed the same goal as the restriction on ownership concentration. These rules were not designed to serve efficiency but instead the allocational goal of keeping control over broadcast content in the hands of a larger number of decision makers.

All these broadcast ownership rules restricted concentration more than would a market efficiency oriented antitrust analysis. Similarly, in applying the antitrust laws, courts found JOAs to be (often) inconsistent with antitrust rules because they allowed anti-competitive concentration of economic power. Congress in the Newspaper Preservation Act took the opposite tack. The NPA represented a judgment that a likelihood of greater exploitation of more concentrated market power (especially over advertisers and maybe over revenue derived directly from sales to newspaper readers) was worth it in order to increase the likelihood that independent editorial voices remained alive – a goal similar to that embodied in the broadcast rules.

Finally, some media specific regulations arguably aimed at allowing concentration that would seem to contradict the antitrust premise that competition best serves society. Local cable franchise monopolies might be explained on a number of grounds, not all of them benign. Although now prohibited by statute, two policy arguments provide their most legitimate justification. First, the earlier practice of granting local cable franchise monopolies represents a plausible judgement that competing cable systems, laying their own wires and duplicating each others infrastructure costs, is behavior that even if induced by the market amounts to a wasteful use of resources and hence is an undesirable form of competition. Potential negative aspects of monopoly could be reduced by rate regulation and by mandates that channel space by made available to programmers that are independent of the cable system owner – a regulation that would increase the number of entities getting to communicate over cable. Second, and more importantly, government regulation could direct that some of the saving generated by avoiding this wasteful competition, combined with revenue from a somewhat “monopoly” pricing, be used to support forms of communications content and expressive forums –illustrated by the public access, governmental, and educational channels – that add to both diversity and consumer welfare.

After observing these differences between antitrust and long practiced media specific regulation, what is most evident is that the trend over the last twentyfive years has been away from all regulation serving values other than controlling a firm's market power to engage in inefficient pricing. Many if not most of the media specific regulations described above have been rejected – either by Congressional, agency, or court action. Although I have not demonstrated the point here, I believe it is also evident that this process of change has been aided by a tendency for courts or policy makers to adopt one or both of two rhetorical stances. Often they argue (or more likely assume) that an economic efficiency goal is the only plausible explanation for media specific regulations and then show that these regulations were irrational in their service of this value. Alternatively, they argue that any supportable non-economic value in fact would turn out to be best served by competitive market behavior and ill-served by regulatory control of ownership. Parts II and III will consider arguments for and against these views.

II. Ownership as not a Problem

Presumably, a policy concern with ownership reflects a fear of concentration. There are, however, other related possibilities. It could also or instead be a concern about ***who*** owns the media, that is about traits of the owners. The policy goal might be to disperse ownership among different groups. Society might benefit by having both leftist and conservative owners. Leaving aside the difficult issue of what constitutes "better," maybe local rather than absentee owners or maybe ownership integrated with management would provide better media content and would better serve either consumer or democratic needs. Arguably, ownership by firms in the media business would produce better content than would conglomerate firms that also operate in other lines of business. Or maybe it would be desirable if ownership took varying forms, with different forms of economic bases. Finally, often the real issue may be *control,* for which ownership is a loose but imperfect proxy; moreover, the degree to which it is a good proxy may vary given legal and various contextual sociological factors. If the focus of concern turns to control, it may turn out that control over different issues – budget versus content, for instance – is not always in the same hands and these different control elements have complex but socially relevant interactions. In any event, legal policy can affect whether, when, and the extent to which ownership equates with control and may affect whose hands holds each.[109] These matters are important – some will be briefly addressed later. Concentration, however, is routinely the central matter raised by media critics and will be the first matter discussed here.

At least three arguments could be made to show that concentration should not be a serious policy concern, at least not today. First, maybe the market effectively requires (or encourages) owners, *whoever they are*, to supply roughly the same diverse media products. If so, then who owns the media may just not be very important. Second, maybe ownership is now sufficiently dispersed that existing or realistically threatened concentration poses no real problem. In fact, greater concentration than currently exists might even be beneficial. Third, maybe the professional work habits of the journalists and writers, who are the actual producers, largely determine what media content actually gets produced and sees the light of day. If so, *whoever the owners are*, these owners may neither try to control nor, even if they did try, be able to control content creation except in isolated instances. These occasional instances of ownership intervention often create considerable stir, themselves being subject to media reports or critical exposés, but may not seriously affect either the nature of public life or

[109] Justice O'Connor once argued that "it is important to acknowledge one basic fact: The question is not whether there will be control over who gets to speak over cable – the question is who will have this control. Under the FCC's view, the answer is Congress... Under my view, the answer is the cable operator." Turner Broadcasting v. FCC, 512 U.S. 622, 683-84 (1994). Of course, she is right in her first step – the question is who will have control. But for control to rest either with the cable operator or the local broadcast station that wants to be carried, the claimant must look ultimately to law to determine whether it has that control – that is, the law controls. And then, under one law, one private actor again controls as to specific decisions, under another law a different private actor controls. But as to the ultimate source of control – the law – it is generally thought that it is controlled by Congress (or the states when not Congressionally preempted); in contrast, O'Connor claimed authority for the Court to determine control – that is, she wanted "her view" to prevail. Despite this claim, at other points, O'Connor was ready to recognize both that law ultimately controls and that Congress could permissibly adopt laws that give practical control to a private party other than the cable operator – that is, she suggested seeing no First Amendment problem with making some or all of cable into a common carrier. Id. at 684.

the bulk of the communications available to or received by the public. If anything, this sociological claim may apply more fully to large scale (concentrated) corporate organizations than to smaller entities where an individual or family owner exercises more hands-on control. In any event, this third claim argues that the focus on ownership is way overstated in contemporary discussion. I will present and respond to each claim separately.

A. Market Determined Performance

The criticism is familiar. MBA's running newsrooms! Media managers fixated on the bottom line! The critics usually make their point in two parts. First, the commentator identifies unwelcome recent developments – such as the move toward ownership by media conglomerates and publicly traded companies – as the key culprit. Second, this purportedly newly dominant "bottom line mentality" is said to undermine adequate performance of the journalistic or creative function.

Defenders of the existing order might deny that this bottom line orientation is a new problem. I suspect they are at least partly right. I suspect that a review of media commentary at any point in the twentieth century would find the same complaint[110] – although later in this section I will discuss structural reasons to expect that the problem may, as many observers claim, have gotten worse over time. Still, even if the problem is not new, that hardly means that it is not serious. Thus, this defense of the existing order should not satisfy the critics of concentration.

Defenders of the existing order also might reply that there is little basis for criticizing this bottom line mentality. Under traditional notions of markets, market competition provides people with the media that they want and that a democratic society needs. This may be the most popular response. Still, I will not pause here to repeat my or others' extensive criticism of this pollyannaish view of the consequences of effective market competition. The key failing of this popular claim is that economic analysis of even the most traditional and conservative sort would show that, at least in regard to media products, the consequences of

[110] Cf. Upton Sinclair, The Brass Check (1919); George Seldes, Freedom of the Press (1935).

truly effective market competition cannot be predicted to be so benign. The competitive market can be expected to grossly fail to provide for the preferences of the public or the needs of the citizen.[111]

The defenders of existing order might more plausibly take a more radical tack. They could deny the relation of ownership or concentration and the bottom line mentality. That is, their most serious objection challenges the critics' necessary assumption that ownership matters. The issue is whether the bottom-line orientation and the resulting journalism could be different – that is, whether it would be different under a different distribution of ownership – and if not, why does ownership matter? A central reason for market advocates to like and for market critics to disparage markets is the pressure a competitive market structure generates to dictate enterprises' market behavior. Their shared descriptive theory has two parts. First, to survive, a market participant needs to capture at least enough revenue to replace its capital – that is, to cover its costs. Second, given the first constraint and given competition, the firm must provide a product at a price that is as desired as anything its competitors can supply at that price. This dynamic dictates a profit maximization orientation (which is often confused with an efficiency orientation). The result is that the enterprise must try to fulfill the money-backed preferences of its customers as cheaply as possible – if it does not, it will be undersold by a competitor and consequently will fail within the market, eventually going bankrupt.

This market dynamic produces wealth-maximizing or, at least, profit-maximizing behavior but it denies the market enterprises freedom except for the freedom to try to succeed by being as profitable as possible. Failure in the effort to achieve this *market-dictated goal* means eventual exclusion from the market. (In this account, real freedom of choice is left to the realm of consumption – the realm Max Weber described as the household , which is roughly comparable for these purposes with Jurgen Habermas' concept of the life world – where people choose the preferences on which they will spend their money and their "free" time.) Market advocates praise the responsiveness to consumer demands that this structure creates while radical critics often criticize particular behavior that this structure dictates.

[111] See generally, Baker, supra note 95 , Parts I and II.

Putting aside that debate, they seem to agree on the proposition that the market controls enterprise behavior. The important point here is that wherever this market dynamic operates, it makes little difference who the owners are. Or, to be more precise, it must be admitted that some owners are stupid or venial. However, market dynamics operate over time to weed out the stupid and defang the venial. The result is that, given the existing state of technology, the market leads eventually to the (same) optimal production of goods that people want irrespective of any initially assumed set of owners. What we get depends not on owners but on the market – whether this result is to be praised or condemned. On this view, even if too exclusive a focus on the bottom line is bad, the need is not interventions to prevent concentration or to distribute ownership to different market participants. Rather, the need is to develop alternatives to the market (or to restructure the market so that its incentives operate more benignly). Indeed, I partially agree with this point – as did Europe at the time it opted for public broadcasting rather than the "American plan," that is, an advertising funded commercial broadcasting system.

Unless this analysis of market dynamics is relevantly wrong in the media context, the concern with "who owns the media" is a misguided policy inquiry. Therefore a defense of a policy concern with media ownership requires some critique of this account. The critique could take the form of a general denial – this account of market dynamics is wrong everywhere. I have no wish to advance that general claim.[112] Here, instead, I suggest that even if this dynamic is generally very powerful, there are at least two reasons why it does not operate so effectively in the media context and reasons why this level of slippage has huge policy relevance.

First, even if there is a theoretical profit maximizing media content (and production method) toward which the market effectively mandates a firm strive, this content is difficult to identify. Different owners (or managers) will make quite different guesses in trying to create this content. Even if all Hollywood studio heads wanted only to maximize profits, they hardly

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[112] I have actually relied on the claim that this market dynamic is generally effective in other contexts. See C. Edwin Baker, Human Liberty and Freedom of Speech, ch. 9 (1989).

know how (even if they sacrifice other values in the attempt). Different content strategies are constantly being attempted. Thus, there will always be significant, non-market determined human variation in the content of media products. Enough systematic error is probably built into an effort to create profit maximizing media products on the part of the profit maximizers that there will be room for different owners to make choices influenced in part by other goals, such as personal ideology, without seriously sacrificing the profits they need to avoid bankruptcy. Moreover, to the extent they are comparatively better than their competitors at finding profitable strategies, this will provide more options for successfully "subsidizing" their other, non-profit maximizing aims, aims that often involve choices about content. If either Murdoch or Berlusconi is good at being profitable, this increases his options to be ideological.

The second point, however, is more important. Monopolistic competition theory applies to media goods. They, like utilities, characteristically manifest the "public good" attribute of having declining average costs over the relevant range of their supply curves due to a significant portion of the product's cost being its "first copy cost," with additional copies having a low to zero cost. There are a number of important attributes of monopolistic competition that are relevant for policy analysis and that distinguish it from the standard model of so-called pure competition, the standard model that underwrites the belief that a properly working market leads inexorably to the best result (given the market's givens of existing market expressed preferences and the existing distribution of wealth). The first feature to note here is that in monopolistic competition often products prevail that do not have close, certainly not identical, substitutes. Second, this non-substitutability of the prevailing monopolistic product will allow reaping of potentially significant monopoly profits – although, of course, some media products only succeed minimally. In this second category, financial success may require the producer to adopt the single best profit maximizing strategy, leaving little room to maneuver in formulating the product. Nevertheless, within this type of competition, products' uniqueness or monopoly status often permits considerable margin for variation while still remaining profitable. The "potential" profit of the profit maximizing strategy can be realized and taken out as profit – which is what the corporate newspaper chains are accused of doing. However, the market itself does not require the profit maximizing response as it does in model of pure competition. Rather, the potential profit can instead be spent on indulging (or "subsidizing") the owners' choices about content or price.

This abstract economic prediction is amply illustrated by actual accounts from the media industries. Andrè Schiffrin described this process in the book publishing world where he claims that in the past "serious" publishers would find and maintain the loyalty of very profitable authors, the profits from whom the publishers would self-consciously use to sustain the expense of publishing "good" but non-profitable books.[113] This point is important for several reasons. Book publishing is, among industries within the media realm, a comparatively competitive field. Most industries with a relatively large number of players, as book publishing has,[114] would be expected by the model of pure competition to be forced by competitive pressures to adopt a profit maximizing strategy to survive. However, with monopoly products – which include any copyrighted item – the potential exists at each level to obtain monopoly profits. These profits can then be "spent" on non-profit maximizing aims or values of the owners (or whomever has control of the enterprise). Thus, in Schiffrin's account, authors who "make it" commercially are seen to remain loyal to publishing houses, producing considerable revenue for the house. Although it might be thought that this revenue is necessary for the risky activity of looking for the next best seller and thus maximizing long term profits, Schiffrin describes a process where instead publishers see themselves as using this revenue to support serious but non-profitable entries in their list just as the publishers, like many of their authors, see themselves as "paying" themselves not in high salaries or fancy

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[113] Andre Schiffrin, <u>The Business of Books: How International Conglomerates Took Over Publishing and Changed the Way We Read</u> 91, 95, 108 (2000). Schiffrin proceeds to describe this practice being eliminated by the new merged, huge corporate owners of the major publishing houses, many of which are like Random House in demanding that "each book should make money on its own and that one title should no longer be allowed to subsidize another." Id. at 91.

[114] Douglas Gomery concludes that "in terms of the exploitation of concentrated ownership, book publishing and sales have generated less problems than other mass media" and, in his terms, "book publishing must be judged a loose and open oligopoly." Compaine and Gomery, supra note 107, at 135, 136. Gomery reports U.S. government data as listing 2,503 book publishing companies in the United States in 1992 but suggests even this number is quite low because of the government's restrictive definition of publisher. Id. at 63-64.

executive suites but in the "currency" of freedom to do books that they wanted to do.[115] Of course, some might object that these non-profit maximizing "expenditures" on subsidizing editor-chosen books is socially wasteful. That might be true if market results reflect appropriate levels of media production. But for several reasons, including considerable positive externalities associated with "good" books,[116] the behavior Schiffrin describes is likely to move book publishing closer to a social optimum.

Of course, different responses to and uses of these monopoly profits are possible – the market does not dictate how monopoly profits are spent. Schiffrin claims that the new corporate conglomerate owners of the major publishing houses, which dominate the industry,[117] have decided on different priorities. These owners are squeezing much higher rates of returns out of their monopoly properties – targeting rates of 12-15% where 4% had been the industry average – while ending the prior publishers' commitment to make books more readily available by keeping prices down.[118] But according to Schiffrin, while this bottom line corporate objective now largely dominates, some potential profits apparently are spent to satisfy the new owners' political values, reflecting a new "intolera[nce] of dissenting opinions" and generally more conservative political views.[119]

This economically available opportunity to serve various objectives is even more dramatic in other industry sectors, such as with daily newspapers where local monopolies are the norm. The nature of monopolistic competition in newspapers is that it is virtually impossible for a competing local daily to challenge the local monopolist unless the monopoly paper makes extraordinarily bad economic choices. Newspapers in one newspaper cities in

[115] Schiffrin, supra note 113, at 108.

[116] See Baker, supra note 95, at Part I.

[117] Data and reports here vary. Mark Crispen Miller asserts that seven companies dominate book publishing as of 1998 and Gomery concludes that a dozen companies publish about half the books sold in the country. Compaine and Gomery, supra note 107, at 62, 135.

[118] Schiffrin, supra note 113, at 118-19.

[119] Id. at 130-33, 136.

the United States have long generated very high returns in relation to operating costs.[120] The continual complaint is that owners, especially the publicly traded chain corporations, are constantly trying (and able) to impose higher and higher profit rates expectations on their local management, leading to the steady deterioration of journalistic quality. Monopolistic competition is the context that creates this possibility. High first copy costs is a factor that creates the condition for local daily monopolies, especially when there is not sufficient product differentiation among papers. Advertising encourages this lack of product differentiation in newspapers (just as a somewhat different set of advertisers sometimes encourages differentiation among niche magazine publications). The more the local paper's revenue comes from advertisers who want the largest possible reach among consumers in the local population, the more the paper's profit maximizing goal becomes securing the broadest, not the highest paying, audience. Typically, an objective, non-partisan (de-differentiating) voice that speaks equally to all segments of the community best serves this aim.[121] Given achievement of a stable local monopoly, there still remains the question of how to "spend" the potential monopoly profits. Should these potential profits be "cashed out," used to provide for greater access to the paper by pricing it below the most profitable level,[122] used to pay for quality journalism, used to support other (often political or ideological) agendas, or wasted through inefficient (some times family) management?

Market dynamics push toward the first choice prevailing. Those who aim solely at profit maximization will typically be able to offer more to buy an existing monopoly paper than its current income stream is worth "financially" to current owners (or other bidders) for

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[120] Statement of Ben Bagdikian, *In the Matter of Cross-Ownership of Broadcast Stations and Newspaper Newspaper/Radio Cross-Ownership Waiver Policy*, MM Docket Nos. 01-235, 96-197, See Appendix A.

[121] See C. Edwin Baker, Advertising and a Democratic Press ch. 1 (1994). Local daily competition is much more likely to be profitable if (i) there is partisan sponsorship of papers, (ii) the public is politically engaged and consequently desires a more partisan paper, (iii) other factors make the market much more and more fundamentally divided (such as into different language groups), or (iv) advertising plays a less significant role in the newspapers financial success.

[122] William B. Blankenburg, Newspaper Ownership and Control of Circulation to Increase Profits, 59 Journalism Quarterly 390 (1982).

whom quality journalism, service to the community, or partisan advocacy is a dominant value. Thus, any time financial value becomes crucial to owners, for example, because of the need to pay estate taxes, a transfer of control to those whose choice is to cash out profits – rather than to subsidize quality journalism, personal or group ideology, or public availability – becomes likely. Still, the nature of monopolistic competition is that the market itself does not force this choice on media owners. For this reason, who controls the newspaper (or other media outlet) and makes the choice matters significantly.

Moreover, there is a second reason why newspapers may differ from other consumer products in the degree of choice left in the hands of the owners. If it is also the case – which is an empirical issue that may vary from community to community – that those readers that a paper would *gain* if the paper slants content choices toward the owners' personal ideological or other agendas are not significantly less than those the paper *loses* through not adopting a more directly profit-maximizing orientation, a condition made more likely by the paper's monopoly position within the community, then the amount of profits that must be spent to indulge owner's particular non-market determined preferences may be quite modest, maybe even less than public stockholders would note.

The empirical research on whether newspaper ownership makes a difference generally has been of extraordinarily poor quality.[123] Still, this research arguably suggests that the public benefits slightly from ownership by private independent firms rather than chain ownership of publicly traded firms, but the variation in the consequences for quality vary more within than between these ownership categories.[124] Both results seem predictable on the account given above. Choice, not merely market forces, influences quality. Choice explains the variation both within and between ownership categories. Moreover, quality generally represents a choice to favor values other than bottom line results. Corporate chains may provide some efficiencies and management qualities that sometimes increase the enterprise's

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[123] C. Edwin Baker, Ownership of Newspapers: The View From Positivist Social Science (monograph, Shorenstein Barone Center of JFK School of Gov., Harvard U. 1994).

[124] Id.

potential for either profits or quality. However, the incentives for executives (editors and publishers) in chain firms as well as the added pressures of public ownership are likely to be directed toward focusing on increasing profits. Possibly due to pride of membership or involvement within a community that leads to dedication to or desires for status in that community, local ownership might be sociologically predicted to lead to greater commitment to and greater choice to serve values other than the bottom line.

In sum, the degree of choice available to media owners and expense of exercising choice may vary with context, especially with the industrial structure of the particular media sector considered. Nevertheless, even if (as I believe) the nature of market competition forces successful producers of some consumer products to pursue profit maximization to the detriment of virtually any conflicting goal – a dynamic that, as noted above, provides the basis for many to praise and others to criticize the market – this market determination operates much less forcefully in the context of monopolistic competition in general and in respect to media products in particular. Thus, the identity of the owner matters – or, more specifically, the identity of the people who *control* the media entity matters, whether these people be owners, management, workers, or whoever.

B. Ownership is Diverse

Not only is media concentration popularly accepted as dangerous in a democratic society, the received wisdom is that media concentration both exists and is growing.[125] Nevertheless, the lead author of probably the most definitive book on media ownership within the United States, Benjamin Compaine, despite trying to give a balanced account, clearly inclines toward seeing concentration as not a problem. His answer to the question: who owns the media, is: "thousands of large and small firms and organizations ... controlled, directly and indirectly, by hundreds of thousands of stockholders, as well as by public opinion."[126] He

[125] See, e.g., Ben H. Bagdikian, *Media Monopolies*, *6th ed.* (2000); Herman & McChesney, supra note .

[126] Compaine & Gomery, supra note 107, at 578. Compaine and his co-author disagree, with Gomery's conclusions being much closer to the received view. Still, there are other informed observers in addition to Compaine who are equally skeptical about claims of concentration. See, e.g., Eli Noam, "Media Concentration

goes on to suggest that the new media market "may be noted more for information overload and fragmentation than for concentration and scarcity."[127] A review of his argument provides an opportunity to consider how a policy analyst should think about media concentration.

Compaine suggests that the appropriate characterization of the level of concentration or monopolization depends on answers to at least two questions: What constitutes the relevant market and what level of concentration is too much. Put aside the first issue for the moment. The second question is obviously crucial. Compaine plausibly distinguishes two different evaluation frameworks: an antitrust standard and a sociopolitical standard concerned with the needs of a flourishing democracy and free society. A society might wisely consider the second to be more fundamental, but Compaine accurately observes there is no accepted criteria for measuring concentration under the second standard. He then suggests that "the antitrust standard is [presumably] intended to promote [the sociopolitical standard]."[128] Purportedly, the sociopolitical concerns are included directly by those who favor the "multivalued" approach to antitrust. Nevertheless, at least for discursive purposes, Compaine favors the dominant (Chicago) approach to antitrust, which emphasizes economic efficiency and market power. For example, looking solely at market concerns, the Herfindahl-Hirschman Index is often recommended within this economic approach as a rule-of-thumb measure of concentration,[129] with an industry score of under 1,000 being considered unconcentrated, a score of more than 1,800 indicating high concentration and often raising

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in the United States: Industry Trends and Regulatory Responses" (nd) <ttp://www.vii.org/papers/medconc.htm|> Although recognizing some arenas where media concentration is a problem, Noam's main conclusions are that "[i]n the cyber-media future, scarcity and gatekeepers will be largely eliminated" and that "it is unlikely that media conglomerates combining all aspects of media will be successful in the long term." Id. at 7. On the same day (24 Aug 2001) that I first read Noam's paper, I also read an online column by Norman Solomon, "Denial and the Ravaging of Cyberspace," where Solomon observed that "Websites operated by just four corporations account for 50.4 percent of the time that U.S. users of the Web are now spending online."

[127] Id.

[128] Id. at 547.

[129] For antitrust purposes, often even a high HHI will not imply undue concentration, for example, if barriers to entry are sufficiently low. Thus, antitrust regulators view the HHI as only one tool of (initial) analysis.

antitrust concerns.[130] Thus, the HHI becomes a standard against which Compaine often makes his comparisons. He defends using the Chicago school antitrust approach on grounds that it has the advantage that its "criteria tend to be relatively identifiable, quantified and validated, ... are less likely to run into First Amendment barriers, ... *are [in many ways] reasonable surrogates for socio-political criteria,* ... [and] may be less susceptible to 'the law of unintended consequences."[131] His argument could falter, of course, if there were reason to expect this Chicago approach would significantly diverge from concerns focused on the needs of democracy and a free society.

Compaine places possibly greater argumentative weight on the first issue, the problem of identifying the relevant market in which to examine concentration. The issue's importance cannot be overstated. For example, if General Motors and Ford merged and DaimlerChrysler stemmed losses by closing Chrysler, the market for so called "American cars" would be extremely concentrated (depending in part on how American-*made* cars of foreign companies are categorized), the market for "cars" would be considerably less so, the market for transportation vehicles even less, while the market for "consumer goods," of which cars are only one item, would remain very unconcentrated. Which is the *relevant market*? The answer is obviously not merely a factual matter. It depends largely on why the question is being asked. As one possibility, consider versions of antitrust law that focus on market power over pricing (which it assumes relates to economic efficiency) as the central concern – the ruling Chicago school approach to antitrust. From this perspective, the relevant market is any describable portion of the existing order in which the purportedly concentrated firms would be able to exercise monopoly pricing power – the crucial issue being the degree of cross elasticity of demand between items. For example, in the example above, the issue would be the price elasticity between American cars, cars, transportation devices, and consumer goods and,

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[130] Id. at 558. The index score results from squaring the percentage of the market held by each firm and then adding the squares.

[131] Id. at 555 (emphasis added).

although there is some demand elasticity between each category, probably the relevant category is cars.

Nevertheless, identifying market power over price is only one possible issue relating to categorizing a market. For example, in the media realm, which is the focus here, the concern might be with effective opportunities to reach significantly-sized audiences of particular concern to the speaker with expression of the sort the speaker wishes to provide. Or it might be more with consumer choice: providing audiences (consumers) with a diverse choice of *independently created* content of the general sort that the audience is interested in. Either of these standards might produce a conception of the market quite different from the price elasticity criterion. For example, it might turn out that there is considerable viewer demand elasticity between good broadcast sit-coms and evening news and between advertisers' demand for reaching the viewers of each sort of programming – that is, little market power held by a single news broadcaster as long as there were a number of sit-com alternatives. The relevant market might be broadcast programming or even broader. The expressive concerns noted above, however, suggest entirely different conceptions of the relevant market. Moreover, this point about market definition is in addition to the question of the criterion for evaluating competition within the properly defined market – for example, it could be to find pricing power or, alternatively, to promote an appropriate abundance of opportunities for expression of diverse, independently "authored" perspectives that will reach significant audiences.

If "looked at in small, industry-specific pieces," Compaine agrees that "there is indisputably consolidation in some media segments;" but if the media are considered "a single industry, there can be little disagreement that there is more competition than ever..."[132] In his policy discussions, Compaine clearly inclines toward the second perspective – that of a single

[132] Id. at 574. Actually, his own data may suggest otherwise, that it is not more competitive than ever, although the increase in concentration would not be significant, at least it would not be for an antitrust analysis. Applying the Herfindahl-Hirschman index of concentration, Compaine reports that the level of concentration in the media industry viewed as a whole increased from 206 in 1986 and 268 in 1997. Id. at 560-61.

industry – or something like it as the better approach.[133] Only this inclination, for example, can explain his attention to the HHI index for the media industry as a whole – which he concludes is 268, for antitrust analysis a quite unconcentrated communications order.[134] Attention to this HHI number would be merely obscurantist except for a belief that the media industry as a whole is an appropriate unit of analysis.

The other main point that Compaine emphasizes in arriving at his book's final words – "concentrated media power is breaking up"[135] – involves the Internet. As he sees it, the Internet changes everything. It erodes old bottlenecks, blurs the lines between media, makes "conventional industry classifications decreasingly relevant," creates convergence, and lays the foundation for "diversity, accessability and affordability."[136] These purported developments might support Compaine's conclusion that a policy maker ought to examine the converged media as a whole to determine if there is concentration. When this is done, the analyst could reasonably agree that media power "is no longer so concentrated"[137] – justifying his view that the problem may be "information overload and fragmentation, [not] concentration and scarcity."[138]

Compaine makes some important points. Still, both internally and from a perspective of a democratic's society needs for diversity, the argument in the end is unpersuasive or misleading. The fact that people can often get much the same "content" in various different media formats (putting aside when the "format is (part of) the message") – i.e., can watch it either on tv or at a movie theatre or on line or even read the book – correctly shows that concentration within one traditional media segment does not *necessarily* imply concentration

[133] Id. at 573.

[134] Id. at 560-61 (Table 10.5).

[135] Id. at 579 (quoting Philip Meyer, "Clinton-Crazy? No, Net Floods Us with News," USA Today, Oct 4, 1998, Opinion Column, News Section).

[136] Id. at 541, 575.

[137] Id. at 579 (quoting Meyer, supra note).

[138] Id. at 578.

in provision of the content. Before television, the only way to receive access to a movie was to attend a screening at a movie theatre. A company that owned all the theatres (in the relevant geographical area) could decide what movies people (in that area) could see. Today, a movie may also be available on free over-the-air television, pay cable, satellite video broadcasts, videotape rental, and, either now or soon, Internet streaming.[139] When Compaine says that "the difference between the Internet and newspapers, books, records or television is that [the Internet] can be all of those things,"[140] he invokes a notion of convergence that supports his inclusion of all media into one category. Clearly he is right that policy analysis requires some rethinking of when there is concentration. Still, further consideration shows that, in itself, Compaine's observation hardly provides a persuasive argument for lumping all media together.

The reason for a concern with concentration will indicate the arena or product market in which to examine concentration. The analysis can also be run in reverse. The question could be: what reason justifies a particular focus? For example, for understanding Compaine, the question is: what reason could justify his apparent view that the relevant product market is the media as a whole? This focus might at first seem to make sense if the policy goal is providing the public with choices of desired media diversions – with consumer goods. But is that a plausible policy focus? It is a goal of profit-oriented business enterprises, but it seems much to blunt to describe a society's special concern with the media. Can all media be seen as serving the same role in people's lives such that they are relevantly substitutable – even if it is true that to some extent they make trade-offs between very different media just as they make trade-offs between reading the paper and going fishing? From either a societal or individual perspective, whatever value a group of New Yorkers find in the metro section of the *New York Times* is unlikely to be served by a new *Disney* movie or even the metro section of the *Los Angeles Times*. It hardly matters that the later two are available to New York residents via the Internet or otherwise. Of course, the *Los Angeles Times* does provide an

[139] Cf. discussion of *Paramount Pictures*, supra TAN -.

[140] Id. at 575.

alternative to the *New York Times* for a young person seeking a career in news reporting. Even *Disney* provides a potential alternative if the young person merely wants a job working in the realm of communications presented to the public. Obviously, some thought must be given to why the question of concentration is being raised – an issue I consider directly in Part III. My claim here is only that, for any plausible answer, the media as a whole will not be the relevant category.

One common answer for why concentration is important is that concentration helps identify when a firm has economic power to act "inefficiently." Although I will later reject this answer as insufficient to explain the appropriate concern with concentration, it is admittedly important to identify concentration that can lead to antitrust violations by enabling monopolistic or non-competitive power over pricing. Compaine often seems to recommend this focus. He suggests both that the criteria for antitrust analyses are relatively well worked out and that this standard serves as a "reasonable surrogate" for the highly subjective category of other possible social and political measures of concentration.[141] Nevertheless, the media as a whole is a misguided focus for two reasons. First, there is virtually no conceivable state of affairs (e.g., a revolutionary expansion of the role of the Internet) in which the media industry as a whole is the appropriate product market for measuring concentration even from the antitrust perspective. Second, Compaine is wrong about the antitrust perspective being a good surrogate for appropriate social and political concerns.

1. Concentration and Antitrust.

Content creation and content delivery are quite different activities.[142] Given both the expense and often the more efficient common carriage operation of delivery systems, Bruce Owen argues that First Amendment rooted interests in diversity generally can be best furthered by keeping the two separate. Owen's hope was not only would this separation

[141] Id. at 554-5, 557-58.

[142] At times Compaine recognizes, even emphasizes this point. Although Compaine's rhetoric suggests a unified media framework and often, for example, when he applies the HHI to the media as a whole he combines media engaged in these alternative activities, he actually emphasized that "media" involve "discrete types of activities," which he describes as content or substance, process or delivery, and format or display. Compaine, supra note 107, at 542.

reduce economic behaviors to entry in the business' of content creation and content sale but also that it would help prevent power in one dimension, especially power over delivery, from being leveraged to exercise control over the communicative opportunities of content creators.[143] Owen believed that government regulation of content creation (which should usually be barred by the First Amendment) is very problematic but that both desirable public policy and expressive freedom could often be advanced by regulation of the delivery activity, especially by common carrier type regulation. Congress and the FCC once took this view seriously. For example, they generally barred cross ownership of telephone companies and cable systems. The hope was that, if kept separate, telephone systems operating as common carriers would provide the means for competition in providing households with cable-type video content.[144] Suppliers other than cable companies could use telephone lines to distribute their wares to household consumers.

The separateness of creation and delivery has obvious relevance to treating the media as a single industry in evaluating concentration. Some media are fully engaged equally in both activities – that is typically true for newspapers. However, at least when in an enterprise is only or primarily involved in one it should not be compared with an enterprise involved in the other activity when evaluating concentration for antitrust purposes. For example, even if thousands of media producers created a rich array of media content, monopoly power would exist over those content creators and over consumers that depend heavily on a single distributor – and problematic concentration would exist if there were too few distributors and entry into the distribution business was difficult. This fact helps justify imposing common carriage and rate regulation on distributors – the US mail, telephone companies, cable system

[143] Bruce Owen, Economics and Freedom of Expression: Media Structure and the First Amendment (1975).

[144] This position did not fare well in the courts, Chesapeake and Potomac Telephone Co. v. United States, 42 F.3d 181 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996); U.S. West v. United States, 48 F.3d 1092 (9th Cir. 1994), *vacated*, 516 U.S. 1155 (1966), where it was subjected to an (arguably misguided) First Amendment attack, C. Edwin Baker, "Merging Phone & Cable," 17 *Hastings Comm/Ent L. Rev.* 97 (1994), or in a deregulatory Congress, where the rule was repealed by the 1996 Telecommunications Act.

operators, or even broadcasters for some types of messages.[145] In any event, concentration for antitrust type policy exists at least if there is concentration of those engaged in either content creation or delivery. The category of media as a whole is clearly too big. But the complaint is much broader. Even for antitrust purposes, consumers (and advertisers) will often not view different media as ready substitutes – they will have high cross elasticities of demand. That is the point of comparing the *New York Times*' Metro Section with either *Disney* or the *Los Angeles Times'* Metro Section. In each case where the products are not substitutable and where it is not easy for a provider of one product to switch over and supply the alternative product, concentration should be evaluated for antitrust purposes in relation to the separate markets in which each product competes.

Compaine identifies the Internet as central to his notion of a "converged" media realm. Without disparaging the content related activities that the Internet allows or makes easier, the Internet is largely a distribution system that enables new and cheaper distributional activities of both a pull (e.g., search engine) and push (e.g., spam) sort. Even if the internet as a tool that sometimes aides some content creators, in itself the Internet does not create content. Any convergence that the Internet creates is somewhat like that of ubiquitous super-stores – WalMarts – where a customer can buy either a winter coat or a country ham. The store itself creates neither nor does it make the winter coats the equivalent or a substitute for country hams. Monopoly power could still exist over any product sold at the store – or for any type of content delivered over the Internet – even though the store, like the Internet, had made access to the monopolized products or communications much easier.

If consumers find various media content substitutable (e.g., if a small decrease in the price or increase in the free availability of one sharply decreases the demand or use of the other), then arguably these products should be considered together for purposes of evaluating

[145] See 47 U.S.C. 313(b) (lowest unit rate to be charged candidates for broadcast time during election periods). This separation is often almost reflex in First Amendment analysis. Thus, although the Court reports no disagreement on the "initial premise [that] ... cable operators ... are entitled to the protection of the First Amendment, Turner Broadcasting, 512 U.S. 622, ___ (1994), rate regulation seems not to pose serious constitutional problems although it might be suspected that similar regulation would be quite questionable as applied to newspaper.

concentration within an antitrust model. To some extent a person might trade-off reading in an "on-line" newspaper a report on peace negotiations in the middle east against watching an episode of the Simpsons (now on TV but surely soon to be "on line"), but surely the better prediction is that these two contents are not very competitive within most people's preference functions. They compete for a person's time like the winter coat and country ham compete for a person's dollar expenditures but the market's are sufficiently different that the coat and ham markets should be considered separate. The availability of many separate firms making sit-coms would not reduce the concern with concentration if only one source provides high quality information about the Middle East (or about local government or about corporate affairs). If so, the antitrust concern with media concentration needs to be much more fine grained in respect to *product* as well as geographic markets – as it has generally been as applied by the courts or pursued by the Antitrust Division of the Department of Justice. Admittedly, an Internet based convergence creates the *potential* for reducing the importance of *geographic markets* and maybe even some format distinctions, but this hardly means it creates a convergence in the content categories and antitrust violations can occur within these.

Of course, the Internet will also affect the product creation market – but the nature of its impact is difficult to predict. Abstract economics suggests simultaneous, opposing pressures. Historically, some evidence suggests that a reduction in distribution costs, which is a major potential contribution of the Internet, increases the likelihood of concentration in the creation of professional quality media content.[146] The idea is that when delivery costs are low, the incentive increases to use resources to make the most widely appealing "first copy" because the return from audience sales can be used to pay for the cost of creation. The result is an audience more concentrated in buying (or otherwise consuming) specific products. This effect tends to reduce to some extent the number of diverse products available. In contrast, when delivery costs are higher, increasing the audience is less valuable (because part of the audience's value is lost in paying for delivery). Thus, when delivery costs are higher, the

[146] Baker, supra note 95, at 290-92 (discussing this point as well as a counter tendency).

resulting incentive is to provide for the more varied needs or interests of individual audience members.

The point is general. The issue is how the decline of distribution (and copy) costs affects the tendency to produce a few mass appeal products or a greater plurality of uniquely appealing products. When distribution costs are high, profits are increased or maintained by an increased expenditure on the first copy only if the increased first copy expenditure results in enough increase in purchasers (increase in audience) to cover this increased expenditure plus pay the high cost of delivering the product to this increased audience. For example, maintaining (or increasing) profits by increasing the first copy expenditure from $1 to $4 must result in an increase in the audience purchasers by enough to pay the added $3 expenditure on the first copy plus the increased delivery cost resulting from more purchasers. The reduction of distribution costs makes audience reach comparatively more valuable because none of the products value is lost due to delivery costs. Therefore, more will be spent on achieving that reach –with the consequent effect of increasing concentration.

This incentive to spend on first copy in order to create larger audience products is not the only effect, however. Reduced delivery costs also allows more people to try to become content creators – that is, it lowers the barriers to entry. Most dramatically, it can support a voluntary economy of non-commodified content creators. And, like with any lowering of costs of a providing a product and hence lowering of price, it can increase the demand for products of that type. Thus, on the one hand, lower distribution costs can make new, more diversified product offerings cheaper and, thus, more prominent; but, on the other hand, the increased incentive to make greater firs copy expenditures to attract larger audiences can reduce the likelihood that small-audience content creators will succeed commercially. The dominance of these opposing pressures can hardly be predicted abstractly and aspects of both are likely to be present in differing domains.

In sum, any suggestion that for antitrust purposes the relevant product market is the media as a whole must be rejected. First, delivery and content creation involve sufficiently separate activities that lack of market share and consequent market power in one says virtually nothing about possible inappropriate market power in the other. Second, different media products are simply not substitutes for each other. These observations, of course, do not demonstrate that problematic concentration exists or where it exists – those issues require much more empirical examination for which at places the data in Compaine's book would be relevant. Moreover, observations about convergence are right in one respect. Even if various products (a Seattle Mariners broadcast, national news, or Buffy the Vampire Slayer) in what is conventionally seen as one industry – broadcasting – are not really within the same market, products provided in different formats (the baseball broadcast and sports magazines, the news broadcast and daily paper or a weekly news magazine) may or, depending on empirical matters, may not serve as substitutes and be considered in the same market. Alternatively, even if a right wing daily paper and a right wing news weekly are in the same market, two dailies – a left wing and a right wing – may not be. They may not be competing for the same audience such that a price reduction in one would not significantly affect demand for the other. Finally, although the Internet certainly changes the competitive situation in various ways, there is no reason to believe that it eliminates even narrow antitrust concerns with concentration in various areas on content creation. There is some possibility that the Internet will increase the number of "volunteer" (that is, non-profit oriented) publishers while causing an increased concentration of professional quality media and an increase in the time that people spend on these concentrated media.

2. Antitrust and Other (Economic?) Values

Possibly the primary weakness of Compaine's antitrust type analysis of concentration is that market power over price is a conceptually and predictably empirically inadequate proxy for the socio-political concerns with concentration. Or, in economic terms, the antitrust market analysis can be expected to be inadequate for identifying when mergers do or do not increase the likelihood of advancing or impeding consumer welfare or "efficiency." There are a number or reasons for this inadequacy.

(i) Power over choice and monopolistic competition. The first has to do with the earlier noted difference between power over price and power over choice.[147] A merged firm may have significant power to change the content of its product without having the power to raise its price. Since this claim may be counter intuitive to some economists, it requires some elaboration.

Economists often assume that although non-price as well as price competition is often possible, as long as prices are not artificially fixed, the power to change either means that there should be power to do the other. By becoming a monopolist, the enterprise gains the power either to increase profits by increasing price or reducing expenditures on the product – with there being some optimal combination of strategies for purposes of profit maximization. Considering the issue more carefully, the power over either price or content depends on how a change will affect people's willingness to purchase. Content changes could be of either of two sorts – it could involve different expenditures on content creation or merely different content with the same amount spent on it. Depending on competitive conditions (among other factors), one or the other or both of these options may be available. In fact, Part II-A was largely about why the second is often possible. A profit-oriented firm may have little power to change price while having considerable power to change content (in either one or both of the ways described) if a change in content will cause a lower "net" number of people not to purchase than would a comparable increase in price. (I put aside apples/oranges scaling problems – what size increase in price is comparable to a particular change in content.) "Net" is important. Other factors being equal, an increase in price normally leads to some people not buying but not to new people buying.[148] Not so for changes in content. A change here is likely to lead some people to whom the change appeals to newly become purchasers at the same time it causes some prior regular purchasers to abandon the product. Under some circumstances, the two groups may be exactly equivalent even though for a declining cost

[147] As used here, "power" refers to a capacity to move away from a prior (or imagined) competitive equilibrium in a manner that either increases profits or results in content conforming more to desires of the owner.

[148] I put aside occasional false signaling or status features of price – that the higher price in itself increases the desire for the product.

good like a media product, there is insufficient demand to pay for both alternative products. If so, a profit maximizing firm with *no power over price* could have *great power over content*, being completely or relatively unconstrained in respect to certain content changes – i.e., editorial slant, creative aesthetic, particular columns, etc. Some hypothetical examples may help make the point more concrete.

Consider a newspaper chain, Firm X, buying an additional newspaper in an area where it does not currently own any papers or other media outlets. Section II-A argued that the nature of monopoly competition means that the owner will be able to make choices about the product – choices that in a sense may be paid for by the existence of monopoly profits. One of these choices involves the paper's per copy price.[149] The purchase by the chain, however, will not change this power over pricing – although it may change the content of the choice – and, thus, should not be a problem from an antitrust perspective. Of course, if there are reasons to expect different sorts of owners would exercise the power differently, this power may justify policy concerns with ownership structure. In addition the owner will have some power to change content. The chosen content will inevitably please some of the paper's potential audience, thereby successfully attracting them, while offending or boring and potentially driving away others. Given market conditions where only one daily newspaper will succeed, different owners could make radically different content choices, each gaining and driving away roughly equal numbers of possible readers/purchasers. This could be true even if (counter-factually) the firm did not have market power over price. Under these conditions, Firm X's power over the editorial content supplied *to people in the country* will have increased due to the purchase.

Next consider Firm Y buying a second radio station in a ten station market in which it already owns one station. Whether or not this creates the type of moderate concentration (using the HHI index) that would suggest antitrust scrutiny probably depends on both the distribution of audience share among the various stations and, given that the most overt

[149] See Blankenburg, supra note 122 and TAN . Blankenburg describes this as the power, like other powers of censorship, to decide whether to deprive a portion of the community of the communications that are vital to their democratic participation.

product of radio is listeners sold to advertisers, how elastic the Antitrust Division believes the relation between radio advertising and other advertising vehicles is. The concern would be power over pricing of advertising time.[150] If, as seems likely, the merger does not create power over pricing, no antitrust issue exists under conventional analyses. On the other hand, in ways quite duplicative of the newspaper example, power to change broadcast content and, thus, power over content choices available to *local radio audiences* is quite likely to exist. Having fewer firms making choices over communications content could be a matter of political or social concern – it certainly has been a major theme in First Amendment theory.

Finally, consider a local daily newspaper, Firm Z, purchasing the only all-news radio station in a market that has several other radio stations. Advertisers might find the value of listeners of the news radio sufficiently similar to those of newspaper readers but sufficiently distinct from other radio listeners that Firm Z will have increased its market power over rates in the advertising market. However, this seems unlikely – and certainly might not be the case, and if it is not, finding monopoly power will be difficult. However, Firm Z's power over news content provided to people in the community, its power to restrict public choice over local news content, seems quite obviously increased. Of course, if news content of the paper and news radio becomes too similar, too degraded, or too offensive to prior customers (without picking up sufficient new customers), the firm's content decisions might cause it to lose readers or listeners or even encourage the entrance of competitors. Thus, the merged firm's power over content is not unlimited. Still, it surely has gained considerable power over news choices available within the community. In fact, an obvious reason for Firm Z to have bought a news radio station (or a station that it will use to provide news) rather than a music station is because of possible synergies (efficiencies) resulting the capacity of its two media operations at least sometimes to employ the same news inputs. In such a scenario, not only will the firm's power over content have broadened to cover more outlets, but the choices made available to the public are likely to have narrowed. That is, the merger will have lead to

[150] This issue was apparently lead to Stucke and Grunes article, supra note 42, arguing that the Antitrust Division should also consider the effect of a merger on the "marketplace of ideas."

no power over prices but considerable power over content and likely a decline in consumer choice due to greater content homogeneity.

Thus, the first complaint about the standard antitrust analysis is that a society can be legitimately concerned with concentrated power over content choices made available to audiences; and, this power is frequently not well correlated with the focus on antitrust attention – power over pricing. As was suggested above in Part II-A, this lack of correlation depends considerably on the nature of monopolistic competition that commonly exists in respect to media products.[151] This power over content but not price is exacerbated by advertisers being the primary source of the media enterprise's income.[152]

Two further normative points about this power over choice have policy relevance. First, in economic terms it describes a situation where the market does not lead either the prior competing firms or the merged firm to make choices that necessarily best satisfy consumer desires, at least to the extent that the firms are not able to price discriminate and thus are unable to obtain the consumer surplus that their choices generate. Second, any democratic concern with the distribution of uncontrolled power over information or public opinion is exacerbated by the concentration created by the merger.

(ii) Concentration and Externalities. The incentive to merge presumably reflects benefits accruing to the merged entity. At a simplistic level, antitrust economics imagines that these benefits can take as least two forms[153] – "efficiencies" that presumably represent more socially valuable use of economic resources and "redistributions" that reflect the use of

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[151] Perfect competition requires two features contrary to that which exist for media products – the goods should be homogenous and be sold at a point on their supply curve where marginal costs are increasing. For a discussion of conditions of perfect competition, see Averitt and Lande, supra note 56, at 724-27.

[152] This role of advertising reduces considerably the influence of audience preferences in determining the content of media communications as well as to an increase in advertisers' influence over editorial content. C. Edwin Baker, Advertising and a Democratic Press (1994).

[153] Not relevant here but increasingly commented upon in the scholarly literature is that often corporate officers may be motivated by their personal desires to control a larger corporate entity, a result that may be its own (psychological) benefit or may justify larger executive salaries. Of course, the opposite may be true - officers of the potentially bought out firm, if they would loose their position, may resist even desirable (e.g., to stockholders) mergers for related "persona" reasons.

monopoly power to transfer wealth from consumers to the merged firm, usually by means that also involve “inefficient” restrictions on production due to monopoly pricing. The first benefit is presumably a social “good” and is why the law happily allows many mergers. The second benefit to the firm is a social and economic “bad.”[154] It provides a reason for the antitrust laws. The further point to be developed in this section, often advanced using non-economic language but also describable in economic terms, is that the merger may create either new positive or negative externalities. If on balance, there is strong reason to expect significant negative externalities and to expect that these will greatly outweigh any positive externalities as well as any of the efficiency benefits of the merger, this expectation would provide a strong reason to oppose mergers even if they did not generate market power over pricing. In fact, most people who generally oppose media mergers are often implicitly making this claim about negative externalities, a claim that is seldom answered by those recommending an antitrust focus on more limited economic calculations. I will not attempt to examine all versions of this argument or identify all the contexts where it should be persuasive, but an example can make the point more concrete.

Consider the merger of two entities that both supply local news within one community – possibly the newspaper and radio station hypothesized above. One item both news entities “sell” is exposés – the content of investigative journalism. Not just the readers or listeners but all members of the community benefit from whatever reform or better government or improved corporate behavior that occurs due to these stories. This journalism can create huge positive externalities. The paper’s limited number of purchasers cannot be expected to pay the full value of this benefit – they have no reason to pay for the value received by non-readers. Even more (economically) troubling, a major benefit of the existence of news organizations that engage in relatively effective investigative journalism is that this journalism deters wrong doing by governmental or corporate actors – but *deterred* behavior produces no

[154] The inefficiency of monopolistic pricing is the uncontroversial social “bad” – although it can in some circumstances be substantially reduced by price discrimination (even eliminated if price discrimination were fully effective and costless). The redistribution is also generally recognized as a bad and provides part of the rationale for antitrust law. Cf Averitt and Lande, supra note 56.

story for the journalism to report and hence for the media entity to sell. The paper has no opportunity to internalize these benefits of its journalism – an economic explanation for there being less of this type of journalism than a straight welfare economics analysis justifies.

Now turn to the consequences of a merger. Pre-merger, both news enterprises presumably settled on some level of investigative reporting that, based on the analysis suggested here, may have been profit maximizing but would have been less than socially efficient. Presumably the merged entity would still have an incentive to engage in at least a profit-maximizing amount of investigative journalism. But how much is that? The amount spent in the pre-merger situation may have reflected merely an amount that the media entity's audience wanted and would pay for (either directly or indirectly through being "sold" to advertisers). Alternatively, the pre-merger profit maximizing level for each independent entity may have reflected a competitive need to compare adequately to product offered by its competitor. In this second scenario, competition may have induced increased but still inefficiently small expenditures on investigative journalism.

Given the first scenario, if the provision of investigative journalism and exposés was satisfying an audience demand, there would be little necessity for the two media entities to supply different sets of exposés to the two audiences. Presumably the merged enterprise could share the results of its investigative journalism, now supplying to each entity's respective audience (customers) only the amount previously supplied by the larger of two investigative units. That is, if the pre-merger newspaper spent x and the news radio station spent y on investigative journalism, and if $x > y$, then prior to the merger the community received the inefficiently low level of $(x + y)$ spent on investigative journalism, while after the merger, the combined operation could be expected to spend an even more inefficient x. What is from the perspective of the merged entity a profitable "synergy" is from the perspective of the community an inefficient loss of positive externalities.

The pre-merger situation in the second scenario represents the competitive dynamics earlier described as "ruinous" or inefficient competition[155] – for example, when each of three

[155] See TAN.

broadcasters produces similar products to get its share of the large mainstream audience or each of two cable systems largely duplicates each other in hopes of getting a portion of the cable audience. Here, however, the competition can result in more of a product, investigative journalism, that the market systematically and seriously under-produces. The competition is socially beneficial, not ruinous. Since each entity was producing the investigative journalism partly to avoid being compared unfavorably with its competitor, after the merger neither entity would have an incentive to provide as much as before (which means that the merger would exacerbate the efficiency deficit). That is, after the merger, the combined operation would spend less than x and maybe even less than y. Since the pre-merger expenditure of $x + y$ was lower than socially desirable, the merger has made the situation worse *even though* the merger did not create market power over price.

This example illustrates a more general point. Separate ownership of media firms may itself be a positive externality. It would be, for example, if people (as either citizens or consumers) value living in a democratic society in which control over the means of large scale, audience-reaching public expression is more rather than less broadly distributed. Obviously, here a merger can cause a decline in positive externalities without increasing the firm's power over pricing. Here again, the welfare loss (and the predictably more objectionable welfare distribution) is not identified by the traditional antitrust analysis. Of course, the empirical evidence of this sort of loss is not available to positivist demonstration. Economic tools (e.g., externality analysis) can explain and predict the bad consequences of concentration but, unlike in the case of actual increases in power over pricing, cannot be used to measure or identify them empirically. At best what economic theory can do is describe predictable externalities of different ownership structures. Even identifying the variances of these externalities requires not economic theory but an understanding of values not measurable by market mechanisms that media can and do have for people in a free society. The only institutional mechanism in which these real values are identifiable are more political institutions – legislative bodies or agency proceedings in which people can indicate that they value a more dispersed ownership structure of media enterprises. In such context, the relevant evidence is not some empirical information but reasoned claims about the value people can rationally place on ownership dispersal. Still, for present purposes, the point is that these externalities suffice to show the *economic* inadequacy of an antitrust focus solely on market power over pricing. A few remaining comments, though, on the possible content and basis of externalities may be informative.

The externalities associated with separately owned media entities – or more generally, of one as compared to another structure of ownership – relate to benefits received by people other than the people actually consuming the media product (or, more accurately, benefits other than for which the purchaser pays even if she receives some of these but receives them independent of her purchase and consumption). They are benefits that this institutional structure provides as a "public good" (or "public bad") for all people in society. Any content or behavioral differences between separately owned and merged media entities can provide benefits or costs to society as a whole that are not (fully) reflected in audiences' purchases of the media product by audiences (or advertisers' purchase of audiences). This was the point of the discussion about investigative journalism.

Different ownership distributions may also differ in ways that provide positive externalities that are not well described as involving differences in the actual normal content of media products. One example is the value that dispersal of ownership may create in respect to what could be described as value as *potential* content. The (disputable) value of a nuclear arsenal lies not in its actual use but in the protection (the deterrence) its potential use supposedly provides. A society's capacity to maintain its democratic bearings or its ability to resist demagogic manipulation, *may* be served by a broad distribution of expressive power, especially media-based power. Such a distribution may be harder for a demagogue to manipulate or control or may be better able to deter political abuses because of being more difficult to control. On this account, the value of a wide distribution of media ownership lies not in any particular media products that this ownership produces on a day to day basis (such that the value will be reflected in market sales) but the democratic safeguards that this ownership distribution helps provide.[156]

Likewise, people as either a group or an individual may benefit more or less from the existence of one or another democratic forms – may benefit more from a republican, or pluralist, or some other form of democracy than from some alternative. In this sense, forms of democracy, like the last paragraph argued about structures of media ownership, can be public goods (or bads) even if the appropriate characterization of any particular form is politically contested. Moreover, these democratic forms may themselves require (or be better promoted by) one or another form of media ownership.[157] Thus, I have argued elsewhere that a *complex democracy*[158] may benefit society as a whole – that is, is something that many people should be (and are, through collective, political decisions about structures) willing to pay to have or otherwise choose if the choice is available. And a complex democracy may require media entities that not only provide particular content but that are experienced as being owned, or at least controlled, by different groups or by people who identify as and are identified by others as being members of or having allegiances to particular groups. If so, the ownership pattern called for by this democratic theory would have significant positive externalities, but an antitrust analysis would remain blind to the costs of any merger that undermines this distribution.

These examples merely begin to show how a sensitive evaluation of externalities of different media distributions and different media structures could have a huge effect on *economic* views about appropriate legal policy. Still, my suggestion is that popular

[156] According to a classic, influential article by Vince Blasi, "The Checking Value in First Amendment Theory," 1977 American Bar Foundation Res. J. 521, preserving this positive "externality" is practically the entire point of the First Amendment.

[157] I have developed this claim in Baker, supra note 95, at Part II.

[158] Id. (describing complex democracy). "Complex democracy" is an account that claims that democracy should emphasize both "republican" attempts to find a common good, "liberal pluralist" attempts at fair democratic bargaining between social groups, and in addition provide for groups' own internal capacity to engage in self-determinative and self-definitional discourses. Cf. Jurgen Habermas, Between Facts and Norms (1996) (describing a "discourse theory of democracy").

preferences for a wide distribution of media ownership in general – as well as more specific popular concerns about which people or entities own the media and about the structures of ownership and control – reflect often unarticulated judgments or assumptions about the types of factors described here as “externalities” as much or more than concerns about exploitation (distribution) or inefficiencies due to monopoly pricing. These popular concerns and values are real. Even economic theory has the conceptual tools to understand them – but markets simply do not provide good means to measure or respond to them. Any antitrust theory that focuses solely on market power over pricing will be too limited in its consideration of the negative features of concentration.

Thus, this section suggests that Compaine was Pollyannaish in his conclusion that the media realm is not too concentrated for antitrust purposes. But whether or not he is right about the appropriate characterization under existing antitrust theory, any concentration analysis focused only on power over content *price* ignores the equally if not more important issue of concentrated power over content *choice*. While a listing of media outlets and producers owned by the *News Corporation* takes nine pages and list numerous book publishers, broadcast and cable networks, thirty three television stations in the United States, cable or satellite broadcasting systems in all parts of the world (with the apparent exception of Africa), important magazines in the US and elsewhere, movie production and distribution companies, and newspapers in a number of countries and especially in Australia, and a similar list for *AOL Time Warner* goes on for eight pages,[159] may not identify any media concentration from an antitrust perspective. It is hard, however, to credit Compaine’s suggestion that antitrust criteria that do not identify concentration in these cases correlate well with political and social values implicated by concentration. From the perspective increasing a variety types of positive externalities associated with varying media ownership structures, this situation represents presumptively too great a concentration of media power.

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[159] This data and data for other companies is maintained on a web site connected to Columbia Journalism Review. See < http://www.cjr.org/owners/| >

C. Sociology of Production - Journalistically Determined Content

Some critics might argue that an owner such as Murdoch has little power to control the final content produced by his wide-ranging media empire. They might argue that daily news is produced by the collective action of many journalists and editors who operate with set routines and behave according to professional standards In this acccount, an owner is simply not in a position to dictate the practice of journalism and it is this practice, not ownership, that determines the content of the news that people receive.[160]

These correct observations, however, only go so far.[161] They may show that the owner does not have unbridled power over the editorial product – except maybe in rare cases of direct ownership intervention. However, they do not show that owners lack substantial power excisable and exercised in a variety of subtle and unsubtle ways. First, ownership or top management can make choices about profit targets or expected rates of return that translate into newsroom budgets and size of journalistic staff. These choices matter a lot. They can have a tremendous impact on the communicative content produced. Even the modern decline in newspaper audiences may largely be the result of media owners' increasing their targeted rates of return that result in either price increases, intentional circulation cutbacks, or lower editorial budgets that degrade the product.[162] Next, the owner's choice of employees – or the

[160] This sociology of content production began to receive significant scholarly development in the 1970s. A group of scholars showed how the professional and institutional culture of news organizations, journalistic work habits, and newsroom imperatives centrally affect how the media construct the news. See, e.g., Edward Jay Epstein, News from Nowhere (1973); Gaye Tuckman, Making News: A Study in the Construction of Reality (1978); Herbert J. Gans, Deciding Whats News (1979); Mark Fishman, Manufacturing the News (1980). Although this work was not specially aimed at making the point offered here, it would only take a small step beyond its investigations to conclude that media content is determined largely by the practices of the people who create them. They argue these practices are only minimally subject to the directives of owners and are overwhelmingly determined by some combination of professional educational, on-the-job acculturation of these producers plus, and institutional or organizational imperatives that themselves reflect the economic necessities of producing products.

[161] At bottom, sociology of content scholarship makes the point about the media that Max Weber once made about the state – the bureaucracy continues to function and to do most of the work of government in its own way no matter who happens to be in power. Even revolutionary leadership will have only limited ability to direct its operations.

[162] Blankenburg, supra note 122; Baker, note 95, at 67-69.

choice of those employees (top editors) who choose other employees – can have tremendous consequences for the newsroom capabilities, culture, and biases that can translate into huge impacts on content. Owners can vary dramatically in their orientation toward or commitment to expertise, ideology, or diversity among employees and this can translate into who these employees will be, which in turn matters for content produced. Third, although direct interventions may be rare, their occasional occurrence queue the direction of and need for employee self-censorship, which journalists report to be a major determinant of content creation in most corporately owned media. Fourth, although the sociological studies are surely right about the major role of workplace and professional culture and norms to determine what content is created, owners directly or through the top management whom owners do select can substantially effect the creation of the workplace culture and notions of acceptable and unacceptable routines, which in turn are a central part of the production process that influences content.

Thus, although critics are right to the extent that they discover an important element of owner impotence and also right to emphasize matters of routine, workplace culture, and professionalism as major determinants of media content. However, it is wrong to understand these insights as showing that owners do not have huge amounts of power over content and over the construction of media communications, power which is mostly exercised only indirectly.

III. Problems and Goals

Part II rejects possible reasons to ignore ownership concentration in the media realm. Responsive policies, however, should reflect not merely the view that ownership patterns matter. Rather, creation of intelligent policy responses requires an account of the nature of the problem and a notion of the goals toward which the responses should aim. Thus, Part III considers the type of abuses that ownership concentration or ownership distribution causes and then examines the affirmative goals that should be served by legal policies related to ownership.

A. Problems Posed by Ownership

1. The Bottom Line. Consideration of monopolistic competition indicated that the market regularly leaves owners with considerable decision-making discretion and that the exercise of this discretion can have a significant impact on the media content "their" media provide.[163] This consideration suggests that policy should aim to get ownership in the hands of people most likely focused on providing quality content – which almost irrespective of what is meant by "quality," means people less focused on the bottom line.[164] By being less focused on profits, these preferred owners may simply avoid maximum market exploitation of their product by keeping prices comparatively low (although still above marginal cost), with the result that people will benefit by the greater availability of media products. Given that newspaper reading is a major factor determining political participation[165] (and, one suspects, also the quality as well as the amount of participation), William Blankenburg has argued that the decision over price is a major form of editorial policy, and that the choice to maximize profits "suppresses information" and fails to treat the "expelled subscribers" as "citizens."[166] More importantly, many aspects of content on which non-profit maximizing media owners could "spend" their potential monopoly profits produce significant benefits for the public –

[163] I put quotes around "their" given the discussion in the last section of the media workers being the primary determinants of media content. In Miami Herald v. Tornillo, 418 U.S. 241 (1974), the Court objected to a law "because of its intrusion into the function of editors" and in Associated Press v United States, 326 1, 20 (1945), relied on in Miami Herald and even more so in Red Lion v FCC, 395 U.S. 367 (1969), the Court emphasized that "the First Amendment does not sanction repression of [freedom of the press] by private interests" nor does it "afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom." Thus, it is not clear that the First Amendment requires, although it certainly allows, identification of the press with the suppliers of capital (or the "owners") as opposed to, say, the editors or other employees.

[164] This claim assumes that consumers and citizens are better served by devoting efforts and resources toward quality media products beyond the extent that this orientation is profit-maximizing. For doubters, the arguments of both economic theory and democratic theory supporting this assumption are surveyed in Baker, supra note 95.

[165] See, e.g., Ruy A. Teixeria, Why Americans Don't Vote 88 (1987).

[166] Blankenburg, supra note 122, at 398.

often involving the positive externalities produced by better journalism.[167] When a paper or other media entity is profitable but could be more profitable if the newsroom budget were cut, the public interest in quality media would be served by the paper being controlled by people who would make the first choice. Even more than by merely avoiding price gouging, society benefits by owners willingness to exercise "social responsibility" or otherwise emphasize journalistic or creative quality rather than merely maximize the bottom line. Of course, legally mandating social responsibility is recognized to be inconsistent with a free press. However, the impact of legal regulation of ownership on the likelihood of producing or undermining more responsible ownership is a proper legal concern.

From a systemic perspective, the question is whether *categories* of people or systems of ownership control[168] that are more likely to avoid a maniacal focus on the bottom line can be identified in a manner relevant for policy design. Although many more premises are needed to support these conclusions, I suggest that some relevant categories can be described. One supportable hypothesis is that people closer to journalistic/editorial process are generally likely to exercise more desirable decision-making control and to be relatively more concerned with quality and less single-mindedly focused on profit. These people are more likely to have personal and professional commitments to the product. They may also be closer to the community of consumers or of critics who praise (or criticize) them primarily on the quality of the product and not merely the economic success of the firm. Their social position in their community is likely furthered by producing a quality media product. If these suspicions are right, they would justify a number of policy preferences. They justify disfavoring ownership by media conglomerates or newspaper chains (especially of a size beyond the level, if any, where the efficiencies of the marginal addition are not so great) and disfavoring control by

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[167] In traditional welfare economic terms, the claim is that by avoiding profit maximizing, these "preferred" owners make expenditures that produce significant positive externalities, thereby moving closer to the "efficient" or consumer welfare maximizing results.

[168] The FCC already recognizes that these types of considerations might be relevant for public policy when it directs public comments to address whether structural separation should be mandated between two different jointly-owned media both engage in production of local news. In the Matter of Cross-Ownership of Broadcast Stations and Newspapers, Order and Notice of Proposed Rule Making, FCC 01-262 (Sept 20, 2001).

public companies without a dominant owner connected to the media firm's operations or geographic home. These considerations also justify favoring local ownership and ownership or at least control by the professionals who staff the media entity. They explain the FCC's past policy of favoring both local ownership and integration of ownership and control in comparative licensing decisions.[169]

2. An Undemocratic Distribution of Power. What might be called the Berlusconi impropriety refers to a democratic concern with the distribution of communications power in society. Once it is accepted that ownership matters, that is, that audience preferences do not completely control media content, it is clear that influence over public opinion and the democratic process will not only not be distributed in a democratic one-person/one-vote or even on a one-consumer-dollar/one-vote manner. Even though complete equality of communicative power may not be an appropriate goal,[170] a democracy should be concerned both that all groups have a real share of media power and that no one group or individual have too disproportionately large share of this type of power.

This consideration goes a long way to justifying the FCC's earlier limits on ownership, limits that could not be explained from the perspective of the different concerns of a narrow antitrust analysis.[171] This democratic concern with the distribution of communicative power supports restrictions of ownership both locally within a market and nationally. Locally, it justifies opposition to ownership concentration of broadcast properties even when the

[169] Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 395 (1965). In invalidating such criteria, one of the problems identified by the Court of Appeals related not to the wisdom of this type of control but the failure of the desired ownership being maintained "for an appreciable period of time." Bechtel v. FCC, 10 F.3d 875, 879 (D.C.Cir. 1993). From the perspective advanced here, the goal of producing quality journalism rather than maximizing profits, the competitive bidding auction procedure that the FCC adopted in 1998, Competitive Bidding Order, FCC 98-194 (rel. Aug. 18, 1998), to replace the comparative hearings (which certainly had their own problems), has a perverse effect. It gives the license to the bidder who predicts herself as being best able (and willing) to squeeze maximum profits from the license, a goal that I argue above is contrary to the public interest in quality journalism or programming.

[170] Baker, Human Liberty , supra note 112, at 37-46.

[171] Even a broader antitrust approach that maintained a concern with the continued vitality of competition in a marketplace of ideas or with audience choice, see, e.g., Stucke & Grunes, supra note 42, would not explain the goal of maintaining such a wide of a distribution of ownership.

concentration predictably has some efficient consequences for content offering[172] and does not predictably generate enough market power to be a concern within a Chicago school antitrust analysis. Nationally, this distributive concern justifies limits on multiple ownership even though the multiple ownership does not create any particular market power. The aim is explicitly to have a society in which the organs or public opinion formation are maximally dispersed within the population. From the perspective of this major democratic goal, a search for evidence of abuse of power or inefficiency by concentrated media is irrelevant. Dispersal of media power is, like dispersal of voting power, simply a key attribute of a system that can be considered democratic.

3. Democratic Safeguards. The claims here admittedly depend on empirical factors that may not hold under some circumstances. Nevertheless, the claim is that a dispersal of media ownership likely provides, and concentration often undermines, two valuable safeguards to the well being of a democratic society. First, one important function of the media is to expose abuses of power and failures of management by either government or corporate or social groups – this is the basis of the press being identified as a so called Fourth Estate often emphasized by Justice Potter Stewart.[173] It is likely that this role will be performed better by a larger number of competing "watchdogs," each of which may discover the abuse, than by a few. Of course, there is likely some market pressure to perform this watchdog function. But not only, as the externality discussion noted earlier, is that pressure almost always inadequate to lead to an efficience quantity of this activity, a likely "synergy" of a merger is to reduce the total amount of resources committed to responding to this market

[172] Efficiency benefits might result, for example, because of the frequently noted incentive that common ownership gives to respond to diverse preferences. The common owner has comparatively little reason to create products that compete against its other products. Rather than engage in "ruinous" competition for the same dominant market, it is more likely to use its multiple properties to respond to different sorts of preferences, thereby garnering a larger share of the overall potential market, and by the same token producing diversity of a sort.

[173] Although the attribution has been disputed, according to Thomas Carlyle, "[Edmund] Burke said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all. It is not a figure of speech or witty saying; it is a literal fact - very momentus [sic] to us in these times." Quoted in Justice Potter Stewart, "Or of the Press," 26 Hastings L.J. 631, 634 (1975). See generally, Vince Blasi, The Checking Value in First Amendment Theory, 1977 Am. Bar Found. Res. J. 521.

demand. Likewise, it is predictable that a greater pluralism of media owners will result in wider scope being given to watchdog efforts.

Second, those that most need to be watched, those with economic or political power, often seek to control or co-opt the media. Their effort is likely to be easier if there are fewer media entities that these co-opters need to control. If only a few, the entities can be purchased, threatened, bribed, intimidated, or appealed to. Large numbers of *influential* media are more difficult to control.[174] Again safety lies in numbers, in plurality. Safety is even greater if the different media entities have a variety of different financial bases and organizational structures. If a particular structure is vulnerable to a particular form of either intentional or market-based corruption, that vulnerability often will not exist equally within portions of the media structured on other principles with different financial bases.

Even among media all of whom receive public funds, dispersal of control generates a degree of safety. Consider the advantages of a structure containing a plurality of public broadcast stations, each of which makes it only policies and programming decisions, over a centralized system. If public broadcasting as a category has strong support in public opinion, a structure in which government budget reductions apply to all public broadcasters is a blunt and expensive tool to use to reign in a single offending station; even if it were technically possible, a legislative decision cutting off only the individual station for its critical exposé of government would often be too overtly censorious to have any good chance of success – it would generate both strong public criticism and possibly an effective First Amendment legal challenge. In economic or public choice language, the single crusading station will have effectively externalized much of the cost of its alienating action on public broadcasters in general, and the larger group can use their collective public support to defeat the retaliation.

[174] Unfortunately for those who think the Internet has solved all the policy issues regarding media and ownership, the caveat that the media be "influential" is important. Mere exposure of dissident views on some theoretically accessible public media often accomplishes little. There is a sense in which the public reality to which people in power must respond exists only when stories are reported and given adequate prominence by public media entities recognized to be significant. An important empirical issue needing more investigation for purposes of understanding democratic practice involves the lines of communication between media at different levels.

The key point is that its role as a democratic safeguard or watchdog is a major benefit that the media provides. Performance of this role is not sold directly on the market and to the extent it is sold – that is, to the extent people want to read or view a news medium that sometimes exposes malfeasance of those in power – the value to those purchasers does not include the value to all the others who are benefited (or fully count the benefits to the purchasers). Hence, the market will predictably under-produce this performance even when ownership is dispersed. However, media concentration is likely (not certain – this is an empirical prediction) to make underproduction even greater. As discussed below, reduction of this performance is likely to be one of the synergies produced from the perspective of a profit-making firm. Each media entity of the merged firm can often sell the same investigative journalism, the same exposès, thereby reducing the total amount of money that the enterprise needs to spend on information gathering. But the dispersal supports the safety of the media's capacity to perform this public role, not simply because of the combined expenditures on this role of the competitive media entities are likely to be greater than that of merged media entities, but also because dispersal of ownership will make censorious attempts to control or co-opt more difficult.

4. Media vulnerability to pressure – or lean and mean. Related to the concern with democratic safeguards are concrete ways that conglomerate ownership makes the entity and, hence, its editorial product more vulnerable to co-opting or censorious outside pressure. When a media entity is one element of a conglomerate in multiple lines of business, either governmental or powerful private groups that the media covers editorially may find themselves both able (and willing) to put serious economic pressure on one portion of the conglomerate in order to induce the media entity to forebear some critical reporting. Even pure media conglomerates are subject to this when an outside entity or group has the capacity to impose pressure on one element of the conglomerate in order to gain leverage over another. President Nixon, wanting to retaliate against the Washington Post for breaking the Watergate story, famously planned to create difficulties for the Post's broadcast licenses in the license

renewal process.[175] The fear, of course, is that the mere vulnerability to such pressure will influence journalistic decisions before they occur. Commentators speculated that CBS's decision to pull a 60 Minutes show in which Jeffrey Wigand, a former high level tobacco company employee, would report on the tobacco company's knowingly false Congressional testimony, was made in significant part due to CBS's conglomerate interests.[176] Lawrence Tisch, major owner and head of Loews, the company that owned CBS, purportedly feared that the potential lawsuit against CBS for the broadcasting the interview would impede his almost completed negotiations to sell CBS to Westinghouse. Moreover, Wigand's expose was arguably contrary to Tisch's interests given that his Loews Corporation, in addition to owning CBS, also owned Lorillard, a tobacco company that was in the process of buying several tobacco brands from Brown & Williamson, the company that the 60 Minutes broadcast would expose; finally, his son was the President of Lorillard and would be one of the people whom the 60 Minute program would show had arguably committed perjury before Congress.[177] Advertisers apparently exercised power over *Reader's Digest* to get its book publishing subsidiary to cancel publication of a book critical of the advertising industry and Dupont's threat of withdrawal of advertising got Time to get its associated book club to drop the distribution of a book critical of Dupont. [178]In another case of a media conglomerate, drug companies apparently threatened retaliation against the New York Times when Times began publishing a series of stories concerning problems with prescription medicines. The drug companies threatened to withdraw advertising in medical magazines owned by the Times, illustrating how conglomerate ownership can leave a company open to pressure against to restrict their editorial exposés. In this case, no harm to journalism occurred. The Times

[175] Hearings Pursuant to H.R. Res. 802 Before the House Comm. on the Judiciary, 93rd Cong., 2nd Sess., bk. VIII, 321-23 (1974).

[176] Editorial, St. Louis Post-Dispatch D-18, Nov 28, 1995.

[177] Walter Goodman, Covering Tobacco: A Cautionary Tale, NYT C-16, Apr. 2, 1996; Neil Weinstock Netanel, Market Hierarchy and Copyright in Our System of Freedom of Expression, 53 Vanderbilt L.Rev. 1879, 1923-24 (199_).

[178] Baker, supra note 95, at 46.

avoided the pressure – it sold the medical magazines.[179] But the example certainly illustrates the danger created by conglomerate ownership.

5. Conglomerate distortions. The flip side of conglomerate vulnerability to pressure is conglomerate ownership's incentives for distortion. Media ownership can be used as leverage over outsiders, leverage whose value (and potential journalistically corrupt and distortive use) is increased to the extent the media owner has other important economic interests that can benefit from the use of this leverage. During Murdoch's campaign to get licenses for an airline he hoped to start,[180] he reportedly found it profitable to promise Jimmy Carter the support of his *New York Post.* When ownership is held by an entity that has substantial economic interests in fields outside the media realm, there are continual reports of content being molded to serve the firm's overall corporate interests rather than just the interests of the media portion of its business. Simply as a media entity, strong professional demands and some economic incentives encourage the media to maintain the integrity of its content – incentives that lead to newspapers' self-portrayal of maintaining a sturdy wall of separation between church and state, that is, between the journalism and the business or advertising side of its operations. The media benefits to the extent that its audiences see it as making professional not self-interested economic editorial decisions.

The problem is that conglomerate ownership inevitably creates contrary incentives to benefit the enterprise's other interests. These potentially strong incentives will sometimes outweigh the incentive for providing uncorrupted journalism – and will do so even more if the corruption of content can avoid being too obvious, for example, by becoming ingrained "self-censorship" or "business as usual" such that no "bending" event, no "smoking gun" can be identified. Unsurprisingly, overt molding of editorial content will be observed only occasionally. Editors report habitual decisions not to investigate in areas where their reporting

[179] Id.

[180] Schiffrin, supra note 113, at 132. Other examples could be given. E.g., cf. id. at 133 (describing decision not to publish a book by Chris Patten critical of China at time Murdoch was trying to gain entry into China of his media enterprises). Schiffrin asserts: "To Murdoch, the use of publishing to achieve other ends was simply business as usual." Id. at 132.

would be embarrassing to the enterprise's outside interests – often having to do with land use, convention or sports facility development or other local issues.

Of course, the point is not to demonize people like Murdoch but to see how conglomerate ownership creates both the economic vulnerability to outside pressure to corrupt the journalistic enterprise and the converse, the economic incentive to trade corruption of the journalistic product for gains to a conglomerate's non-media interests. Desirable responses to these distortions can take two forms: resistance or (partial) structural removal of the incentives for distortion. As for the first, strengthened professional norms impede the operation of this form of distortion – but one wonders how many careers of courageous journalists must be sacrificed to economic logic before the need for structural change becomes obvious. Thus, the second, most obvious way to respond is to eliminate (or at least reduce) the incentives for corruption by avoiding the form of ownership structure that generates it.

6. Inefficient synergies. Corporate management justify media mergers to their stockholders (and governmental regulators) with loud claims about profitable and efficiency-serving "synergies." As it turns out, a number of enterprises during the 1990s apparently have found it difficult to realize these synergies, but sometimes some cost savings or interactive benefits undoubtedly exist. The idea is, for example, that the merged entertainment company can benefit by presenting the same highly promoted fictional character in new mediums – in a theatre released movie, a television show, a book, a magazine excerpt, a musical CD based on the movie sound track, and especially in the case of children oriented media, as material representations or as characters in computer games. By clever placements, the enterprise can cross promote its various products – the broadcast news division or the magazine can do stories about the release of the enterprise's outstanding new movie or television show, or do in depth reports about the program's star characters, or about the Oscar or Academy award competitions, or other related matters of "great public concern." Or the combined local broadcast station and newspaper can share reporters, thereby reducing the outlays necessary to report on local affairs, or can at least require its reporting staffs to cooperate, thereby reducing the cost of each entity doing the reporting from scratch.

Profitable, however, does not mean in the public interest. Often these "synergies" or efficiency "gains" occur by creating market-dominating media goods that, although profitable for the firm, may provide less value to the public than would the media goods they drive out of existence. In other cases, these synergies result from eliminating alternative pre-merger productive activities that provided significant positive externalities.

Consider the first point. For a product to succeed in the market means that the audience values it in excess of its immediate cost. In that sense, the merged firms' new (or newly expanded) synergistic products undoubtedly provide value to society.[181] Nevertheless, elsewhere I have described how monopolistic competition among media goods can result in the success of products whose competitive success cause the failure of other media products that would produce more "consumer surplus" than do the goods that prevail.[182] The introduction of the new "synergistic" products is likely to cause a slight downward shift in the demand for other media products, causing some of them to fail even though producing them costs much less than their value to potential customers, thereby being capable of producing considerable but now lost consumer surplus.[183] This net decrease in consumer surplus – meaning a loss to society – occurs most often when the prevailing product's demand curve is flatter than that of the media products that it competitively eliminates or when the firm providing the prevailing product is better able to price discriminate in the sale of the prevailing product, for example, by selling the product in multiple "windows," sometimes an option that is itself supported by the merger. These two scenarios describe contexts where the dominant product will produce comparatively little consumer surplus. Another way to see this is that sometimes the hope of synergies purportedly justifying media mergers reflects the

[181] That is, "undoubtedly" unless the content produces bad consequences not taken into account by purchasers - negative externalities of some sort, for instance, increased levels of societal violence.

[182] Baker, supra note 95, chapter 2.

[183] Of course, this problem would not exist if it were not for media goods being unlike goods hypothesized in models of pure competition in that media goods high first copy costs mean they are often sold at a point where their marginal cost is less than their average cost. The problem also would not exist if the seller/producer could adequately price discriminate so as to internalize more of the media product value.

possibility of a greater ability to engage in more effective price discrimination or a greater likelihood of creating “blockbuster” or best selling products. These hoped for synergies, however, translate into public interest worries that the synergies lead to competitively caused damage to consumer welfare by eliminating more valued media alternatives.

The second problem is that sometimes the synergies will amount to eliminating (duplicative) practices that have significant positive externalities and, thus, the elimination will lead to welfare losses. For example, as noted earlier, benefits due to exposure or deterrence of corruption or of official or corporate malfeasance go to people other than the paper’s readers or purchasers. This positive externality translates into the conclusion that the market under supplies the type of journalism that produces these externalities. Merger-related synergies can exacerbate this under-production. One “synergy” of merging a newspaper and a local television station is that they can now get by with the amount of investigative journalism previously done by only one of the two. In fact, now that there is no profit-based competition between the two, even if the merged entity has no market power to raise either subscription or advertising rates, it may no longer have a competitive need to produce any effective investigative journalism. In that case, the merged entity not only does not have to engage in the same total amount of investigative journalism as had the two before they were combined, it may no longer have to engage in as much investigative journalism as either did by itself under competitive conditions. In this case, the “synergy” reflects a loss of social welfare.

This consideration of synergies shows that a merger that is efficient and profitable from the perspective of the firm, even though it does not create the type of power over prices that normally concerns antitrust regulators, can be costly for society. It can directly reduce social welfare. The profit maximization perspective which normally guides the firm and the social welfare perspective which should guide policy do not converge in this context. The damaging results can reflect the consequences of monopolistic competition between new synergistically produced goods and other media goods. Or they can be due to synergies that allow a reduction of expenditures on activities that produce significant positive externalities.

7. Public Benefits of Concentrated Media? Any policy must consider possible benefits as well as costs of media concentration. Merger proponents often argue that mergers can benefit the public both as consumers and as citizens. Both are empirical claims and neither can be empirically assessed here but some comment is appropriate. And beyond trying to determine whether either benefit exists and, if so, what its magnitude is, there would be a question of evaluation. I merely assert that the citizen/democratic issue is most serious and any conclusion relating to it ought to dominate policy making absent an extraordinarily strong case concerning consumer benefits.

The central problem with the assertion that mergers produce social benefits is the difficulty of providing evidence for the claim. Certainly merger proponents often describe great consumer benefits that will purportedly follow, but my impressionist observation is that subsequent experience more often shows disappoints as the routine result. This fact could lead an observer to wonder if either ego or personal financial interests of corporate leadership, not consumer benefits or even corporate economic benefits, is usual driving force behind media mergers.

But suppose that the merger does make real economic sense for the corporation entities involved? What does that imply? In many sectors of the economy, profitability relates directly to efficiency at producing (or distributing) goods or services for the public and, therefor, should be taken as evidence that the benefit to the corporate entity corresponds to a benefit for society. The point of the earlier discussion in this section, however, is to show how the nature of media goods makes it normal for there to be systematic and potentially huge divergences between public benefits (e.g., good for media consumers and the broader public) and media enterprise benefits (efficiencies and profits). Merger-based changes described as increased efficiency or a cost saving is often the elimination of activities that produce positive externalities or a competitive victory that causes the failure of competing media enterprises that would produce more value than does the prevailing firm. Rather than efficiency gains, profits may reflect a wealth transfer from the consumer to the media firm – or, worse, it often reflects the elimination of media activities – such as news bureaus or investigative journalism or creative experimentation – that benefited both the media's immediate consumer and that provided benefits for the broader public. Given these facts, evidence of purported efficiency gains or other economic benefits of a media merger – or evidence of greater profitability of the merged firm – is just as likely to reflect a change that should be economically condemned as destroying value as praised for creating value. These points, of course, do not mean that media mergers cannot benefit the public in some cases. They do mean, however, that the advocacy of potential merger participants must be seen as being as likely to reflect narrow self-interest as it is to reflect any public interest. And it means that any evidence that mergers relate to greater profitability has *no necessary connection* to any public benefit. Thus, the empirical burden to show evidence of benefits needs other sources of demonstration than reference to market data.

Commentators also occasionally suggest that larger corporate entities benefit the public as citizens. The claim is that these entities will be more likely than smaller independent media entities to stand up to outside pressures aimed at bending their reporting or will be able to finance expensive but valuable reporting. This claim too is largely empirical.[184] My impressionistic view suggests the opposite. Eric Sevareid, one of our most prominent television news commentators of the last generation, may have gotten it right when he said: "the bigger the information media, the less courage and freedom of expression they allow. Bigness means weakness... Courage in the realm of ideas goes in inverse ratio to the size of the establishment."[185]

Some possible explanations of Sevareid's conclusion could be given. The reality may be that the likelihood of an media entity's standing up to economic and other types of pressure to avoid investigative exposes has less to do with financial resources and much more to do with a journalistic decision maker's courage and commitment to the integrity of their journalism. *Even if* this type of courage and commitment was distributed equally among heads of small and large media entities, the chances of having this type of valuable journalism occur will be much greater if there are more heads of news entities – that is, less media

[184] Relying on his own experience as owner/editor of a small family owned Kentucky newspaper, XX used dramatic examples to forcefully illustrate his claim the possibility of a paper such as his doing their type of effective advocacy and expose journalism depended on not being owned by a newspaper chain. Erik Barnouw, Conglomerates and the Media (1997).

[185] McDonald, "The Media's Conflict of Interests," Center Magazine 14, 24 (Nov/Dec 1976), quoted in Baker, supra note 95, at 267.

concentration.[186] Moreover, there may be sociological and psychological reasons to expect the more courageous editors not to be distributed randomly. That is, there may be sociological reasons to expect them to more often lead small journalistic enterprises than to have risen to the top in media conglomerates. Editors (or owners) of independent media entities may be more likely to identify with the journalistic endeavor than with their own institutional advancement, which is likely to become an increasing motivating factor for employees within large corporate organizations and which can be threatened by risky exposés or innovative experiments. Moreover, if the creativity or exposés seems too much against the grain of the established order and not capable of producing any obvious financial benefit to the media entity, its development or publication may be least likely if those at the top of the enterprise do not even come from the journalistic or creative side of corporate operations and, thus, do not have as much of an internalized professional commitment to creativity or exposé journalism.

If these empirical hypotheses are right, they provide reason to disfavor media concentration even beyond the extent mandated by dominant interpretation of the antitrust laws. Interestingly, they could also have implications for the appropriate design of public media institutions. The design of public broadcasting, for example, should favor dispersal and decentralization of editorial authority rather than a unified public broadcasting system with authority located at the center.

[186] The claim is that if *percentages* are the same, a higher *number* of owners deciding in favor of exposés will increase the number of exposés. This would not follow if the smaller number of courageous decision makers in the concentrated context could assure that each of their subunits than choose the more courageous stance. Thus, my claim in the sentence in the text implicitly assumes that conglomerate heads will be more effective at inducing avoidance of problems among subordinates in the media conglomerate (e.g., editors of entities owned by the conglomerate), when the head favors caution, than in inducing courage when the head favors producing the exposés. Another way to put this, is that the "safer" response will be more likely the larger the number of potential decision makers there are who have to sign off on the decision to make the choice that could be damaging to the entity – it will be the more likely default rule.

B. Ownership to Serve a Democracy: Diversity of Ownership

The last section considered ways in which ownership concentration can be bad even without leading to antitrust problem such as anti-competitive power over pricing. There remains the question of the implications for concentration policy of an affirmative vision of the role of the media in a democratic society. I now turn briefly to that issue.[187]

No democratic theory condones government censorship and it is widely thought that much censorship by private power is similarly objectionable. All democratic theories assert that the media should be able to perform a "checking" or "watchdog" or "fourth estate" function and any ownership structure that impedes such a role should be presumptively condemned. Beyond this, the affirmative vision of how media can serve a democratic society depends heavily on the favored vision of democracy. In terms of what I label "complex democracy"[188] – a concept quite close to Habermas's "discourse theory of democracy"[189] – the media have the following central functions in addition to the watchdog role discussed in the last section: First, the media should be an instrument of a society-wide public sphere that addresses common problems, values, and solutions – allowing for participation in a society-wide discussion of the "common good." Second, the media should provide a means for various interest groups to identify when their own concerns are at stake and to mobilize their membership for political participation in a society-wide bargaining process. And finally, the media should provide these societal subgroups, especially "subalternian" or marginalized and oppressed groups,[190] a realm of their own for their exploration and identification of their own common good and self-definition.

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[187] This section is based on Baker, supra note 95 (part II), which is revised version of Baker, The Media that Citizens Need, 147 U.Pa.L.Rev. 317 (1998).

[188] See supra note .

[189] Jürgen Habermas, Between Facts and Norms (1996); Jürgen Habermas, "Three Normative Models of Democracy," 1 Constellations 1 (1994).

[190] Nancy Fraser, "Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy," in Craig Calhoun ed., Habermas and the Public Sphere 109, 137 (1992).

Looking solely at the first of these three functions, as do some "republican" or "deliberative" democratic theorists, the central problem is not concentration but the media's "social responsibility." Monopoly or conglomerate media enterprises, as long as they produce good and inclusive journalism aimed at finding, promoting, and elaborating the common good, perfectly fit society's democratic needs of supporting a society wide discourse. Too much dispersal of ownership may even threaten a social fragmentation that would frustrate a common discourse about the common good.

This complacent view of concentration must be rejected by complex democrats who add the latter two functions to the tasks required of a democratic media. To perform these, different societal subgroups need their own media. Admittedly, these subgroups (or their members) may not *necessarily* need to own or control their own independent media. Avenues of regular and effective media access might suffice. Still, much greater confidence that the media will serve the democratic needs of these groups would be justified if ownership or control was so distributed. More specifically, complex democracy has two primary implications for media ownership. First, in addition to society-wide media organized or owned in a way most likely to lead them to be dedicated to social responsibility, ownership of much of the media should be widely dispersed. Source diversity is valuable independent of whether it produces content diversity. Second, the need is not simply for many competing, separately owned media enterprises, not simply for lack of concentration. Democracy also requires that the ownership or control by widely dispersed among the various segments of society.

Of course, existing conditions and any likely market system is likely to provide some media serving each of these democratic functions. The real issue is whether some types are inadequately nourished in a market order – or, for purposes of the current discussion, whether ownership concentration is a condition that likely creates a democratic imbalance. The reasons to suspect this will be the case have already been canvassed.

IV. Conclusion: Implications for Policy

The present discussion is not detailed enough to suggest the specifics of an ideal media ownership policy. Still, the present discussion supports a number of conclusions. First, general antitrust enforcement should continue vigorously. Whether or not in other areas of the economy antitrust law should be largely restricted to concerns with economic efficiency concerns and monopolistic power over pricing, the discussion here suggests that antitrust enforcement should not be so limited in the media arena.

Second, there are at least two reasons to conclude that media ownership should be subject to additional regulation beyond the limits required by antitrust laws. Pragmatically, the advantage of dual legal regime and dual agency enforcement is that lack of political will within one agency or narrow judicial interpretation of laws enforced by one agency will be less damaging to desirable and effective legal restrictions on media concentration. More fundamentally and conceptually, antitrust laws, even on a broad interpretation of their content, do not respond to all the media specific reasons to limit concentration. For example, an expansive antitrust law interpretation may be sensitive to a reduction in competition that gives the merged entity power to narrow consumer's content choice even though the reduction in competition does not lead to any power over pricing.[191] However, even this expansive interpretation, with its focus on competition, is unlikely to embody the policy concerns with assuring maximum numbers of separate ownership groups participating in the "marketplace of ideas." For that purpose, the FCC's now largely abandoned rules strictly limiting national ownership of different broadcast entities to a handful of separate stations made great sense. It promoted ownership pluralism and a more democratic distribution of media power but is not easily explained by an antitrust focus. The same point applies to the earlier FCC policy preference for local ownership or for an integration of ownership and management or control. Even though not always effective – for example, this purpose when used in comparative licensing processes may have been regularly defeated by subsequent license transfers – these

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[191] See, e.g., Averitt & Lande, supra note 56, at 752-53; Stucke & Grunes, supra note 42 .

policies serve media-specific concerns that are not so easily assimilated into antitrust policy. Thus, the discussion here supports generally more stringent, somewhat differently focused, media-specific rules relating to ownership, probably combined with a different enforcement agency.

The ideal way to carry out an affirmative vision of the media's democratic role cannot be spelled out in the abstract. At best, the affirmatives vision can help guide policies that respond to particular contextual conditions that vary from place to place and time to time. Nevertheless, the argument so far suggests the wisdom of James Curran's recommendation that the media ought to organized using a variety of organization and structural forms.[192] Curran envisions five media sectors, each organized on a somewhat different organizational and financial basis and each with its own set of goals or functions and responsive to somewhat different incentives.[193] This plurality of media structures may provide security in that neither corruption that comes from government nor corruption that comes from the market is likely to be equally powerful within or equally damaging to all the organizational forms. For this reason, such a plurality of organizational structures will likely advance the media's checking function. Moreover, this diversity of media structures is likely to enable the media to better perform its multiple democratic assignments.

Curran's more elaborate set of policies may suggest a final point about media ownership. The concerns with ownership relate, in the end, to who has control over media content and how will they use this power. This suggests that an ideal media policy will be concerned with more issues than merely concentration of ownership. Rules relating to control of decision-making *within* media entities should be responsive to the same value-based concerns. *Which* groups of people or *which* individuals, with relations to particular groups,

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[192] James Curran, "Mass Media and Democracy Revisited, in Mass Media and Society 81, 105-112 (James Curran & Michael Gurevitch eds., 2nd ed. 1996).

[193] His five sectors are: core sector (his model here is a social responsibility oriented public broadcast system such as the BBC), civic media sector (performing many of the pluralistic democratic functions described above), professional sector (controlled by media professionals and serving ideals internal to their profession), private enterprise sector, and a social market sector (compensating for inadequacies of the market and developing new forms of competition). Id.

should exercise control is also an important policy matter – as FCC policy favoring racial diversity in ownership implicitly recognized. The general goal is increased pluralism of sources and viewpoint as well as of content forms or subject matter. That pluralism may also be advanced in various ways, one of which may be Curran's suggestion that public policy support a multiple set of organizational or structural forms for different media within society.

Media ownership policy that would best serve a democracy's need for a robust and multi-functional press is unlikely to be provided merely by a competition policy that only tries to prevent combinations that generate anti-competitive power over pricing. Media specific concerns, reflecting both unusual features of media economics and special democratic roles of the media, require media specific polices (including possibly a broader interpretation of the antitrust laws as they apply to the media) and media specific laws. These laws and policies should restrict ownership concentration beyond that required by existing antitrust policy and presumably beyond even that required by broader interpretations of antitrust law. Ideally, these laws and policies should be responsive in a more fine-grained manner not only to ownership but also to other issues of control within media entities that relate to how well the media serve pluralism and other democratic needs.